CRIMINAL YEAR SEMINAR

April 16, 2021
Webinar

Evidence Update

Prepared By:

The Honorable Crane McClennen
Retired Judge of the Maricopa County Superior Court

Distributed By:

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2020 CASE CITES Alphabetically

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ARTICLE 1. GENERAL PROVISIONS.

Rule 102. Purpose.

102.019 When an Arizona evidentiary rule mirrors the corresponding federal rule, Arizona courts look to federal law for guidance, and although the federal courts' interpretation of the Federal Rules of Evidence does not control the interpretation of Arizona's evidentiary rules, federal precedent is particularly persuasive given that Arizona courts have expressly sought to conform Arizona's evidentiary rules to the federal rules.

State v. Stuebe, 249 Ariz. 127, 467 P.3d 252, ¶¶ 1, 9–12 (Ct. App. 2020) (triggered by motion detector, security camera recorded burglary in progress and sent email and video recording to security company; defendant contended email and video were hearsay; court noted federal circuit courts have repeatedly held "person" referenced in the rules of evidence does not include "machine" or "machine-produced" content and held automated email and "machine-produced" video recording attached to email were not hearsay because they were not made by "person").

Rule 103(a). Rulings on Evidence—Preserving a Claim of Error.

103.a.090 To preserve for appeal a claim that the trial court erroneously **excluded** evidence, a party must make a **specific and timely objection,** and must make an **offer of proof** showing that the excluded evidence would be admissible and relevant, unless either the substance of the evidence is apparent from the context of the record, or the trial court excludes the evidence on substantive rather than evidentiary grounds.

State v. Lelevier, 250 Ariz. 165, 476 P.3d 713, ¶¶ 16–18 (Ct. App. 2020) (defendant was convicted of first-degree murder; abandonment or concealment of dead body; sexual exploitation of minor under 15 years of age; surreptitious photographing, videotaping, filming, or digitally recording or viewing; and voyeurism; defendant contended trial court erred in excluding evidence of victim's other acts and character evidence; court noted trial court admitted everything other than defendant's unsupported speculation that victim had used drugs and inadmissible hearsay evidence regarding victim's activities with her friends year before her death, and that defendant had not explained why latter evidence was not properly precluded as hearsay, nor did he make any offer of proof to substantiate his basis for believing victim had used drugs).

State v. Zaid, 249 Ariz. 154, 467 P.3d 279, ¶¶ 8–10 (Ct. App. 2020) (state contended defendant did not make sufficient offer of proof of victim's character; court held substance of evidence was apparent from context, including the state's acknowledgment that witnesses had said victim had violent reputation).

103.a.230 A party is not entitled to a reversal on appeal on the basis of erroneously **admitted** evidence that did not affect a substantial right of the party, and the prejudice to the substantial rights of the party will not be presumed, it must appear in the record.

State v. Lelevier, 250 Ariz. 165, 476 P.3d 713, ¶¶ 11–14 (Ct. App. 2020) (defendant was convicted of first-degree murder; abandonment or concealment of dead body; sexual exploitation of minor under 15 years of age; surreptitious photographing, videotaping, filming, or digitally

recording or viewing; and voyeurism; defendant contended trial court erred in admitting evidence that, 2 months prior to her death, victim caught defendant taking photograph of her while she was partially dressed in her bathroom; trial court reasoned evidence went to defendant's motive and intent to kill victim and supported his knowledge, plan, and lack of mistake when engaging in conduct leading to charges of voyeurism, sexual exploitation of minor, and surreptitious photographing; court held that, even had trial court erred in admitting this evidence, any error was harmless given overwhelming evidence of defendant's other surreptitious surveillance).

103.a.260 A party is not entitled to a reversal on appeal on the basis of erroneously **excluded** evidence that did not affect a substantial right of the party, and the prejudice to the substantial rights of the party will not be presumed, it must appear in the record.

State v. Soza, 249 Ariz. 13, 464 P.3d 696, ¶¶ 24–26 (Ct. App. 2020) (prior to trial, trial court limited prosecution to impeaching defendant with only three of his many prior convictions; on direct examination, defense counsel asked defendant whether he had three prior felony convictions, and he responded in the affirmative; counsel asked if he had take plea agreements in those cases, to which defendant answered, "Yes, I did"; state objected, and at sidebar trial court stated it would sustain objection because circumstances of defendant's prior convictions were irrelevant and defense counsel's question "create[d] a false impression" that defendant "only ha[d] three priors"; trial court did not inform jurors it had sustained objection, and defense counsel proceeded to different line of questioning without trial court's striking defendant's answer; defendant contended that, by sustaining state's objection, trial court improperly prevented defense counsel from rehabilitating his credibility by showing he had accepted responsibility in prior cases; court noted jurors heard that defendant pled guilty for his previous convictions, and state did not ask trial court to strike answer; court concluded that, whether sustaining objection at sidebar was error was not an issue because it had no consequence in the trial).

Rule 104(a). Preliminary Questions — Questions of admissibility generally.

104.a.060 The trial court is not bound by the Rules of Evidence in determining admissibility of evidence.

Devlin v. Browning, 249 Ariz. 143, 467 P.3d 268, ¶ 15 (Ct. App. 2020) (court held rules of evidence generally do not apply at suppression hearing and to officer's reasonable suspicions based on training, experience, and common sense under field conditions, thus trial court could consider preliminary nystagmus test administered by officer in determining whether officer had reasonable suspicion that defendant was DUI).

ARTICLE 2. JUDICIAL NOTICE

Rule 201(b) — Kinds of facts.

201.b.120 An appellate court may take judicial notice of any fact of which a trial court could have taken judicial notice, even if the trial court was not requested to take judicial notice.

State v. Reed, No. 1 CA–CR 17–0620, ¶ 5 (Ct. App. Oct. 20, 2020) (defendant's attorney asked appellate court to take judicial notice of information about victim's attorney and law firm, as well as compensation of public defenders, some of which was available on internet; at time of restitution hearing, that information was either available to defendant's attorney (thus he should have provided it to trial court), or was not available to defendant's attorney (thus he could not have provided it to trial court); appellate court therefore denied request to take judicial notice).

201.b.125 An appellate court may take judicial notice of Revised Arizona Jury Instructions.

State v. Farid, 249 Ariz. 457, 471 P.3d 668, ¶ 9 n.2 (Ct. App. 2020) (appellate court took judicial notice of language used in outdated Third edition RAJI, which counsel accurately quoted to trial court).

State v. Farid, 249 Ariz. 457, 471 P.3d 668, ¶ 10 n.3 (Ct. App. 2020) (appellate court took judicial notice of language used in Fourth edition RAJI (which was current at time of defendant's trial), which does not include "for sale" element in crime of importing marijuana).

201.b.130 An appellate court may take judicial notice of its own records and the records of other courts.

State v. Watson, 248 Ariz. 208, 459 P.3d 120, ¶ 8 n.2 (Ct. App. 2020) (court took judicial notice that accomplice had failed to appear and that trial court had issued bench warrant for her arrest).

ARTICLE 3. PRESUMPTIONS IN CIVIL ACTIONS AND PROCEEDINGS

Rule 301. Presumptions in Civil Cases Generally.

380. Property — Community.

380.090 The general rule is that property acquired by a spouse after service of a petition for dissolution that results in a dissolution is that spouse's separate property, except for property received as a result of an enforceable contractual right, such as property acquired as a result of services rendered during the marriage.

Bowser v. Nguyen, 249 Ariz. 454, 471 P.3d 665, ¶¶ 3, 9–12 (Ct. App. 2020) (husband signed employment contract 12/7/16, which included term guaranteeing him severance package equal to 1 year's salary if his employment was terminated during first year of employment; parties married 1/07/17; husband began working for employer 1/16/17; on 5/23/17, parties filed petition for dissolution, and on same date employer terminated husband's employment; some time later, husband received severance pay; court held that, even though husband received severance payment after petition for dissolution had been filed, that payment was for efforts husband had expended while parties were married, and thus it was community property).

ARTICLE 4. RELEVANCY AND ITS LIMITS

Rule 401. Test for Relevant Evidence (Criminal Cases).

401.cr.010 For evidence to be relevant, it must satisfy two requirements: **First,** the fact to which the evidence relates must be of consequence to the determination of the action (materiality).

State v. Riley, 248 Ariz. 154, 459 P.3d 66, ¶¶ 58–64 (2020) (defendant contended evidence that victim had been in protective custody was not relevant; state argued that victim's time in protective custody made him target for AB hit; court held this established defendant's motive for killing victim, thus this evidence was relevant).

State v. Lelevier, 250 Ariz. 165, 476 P.3d 713, ¶¶ 23–25 (Ct. App. 2020) (defendant was convicted of first-degree murder; abandonment or concealment of dead body; sexual exploitation of minor under 15 years of age; surreptitious photographing, videotaping, filming, or digitally recording or viewing; and voyeurism; defendant contended trial court erred in admitting evidence that, although he typically paid for purchases with debit card, day after victim's death, he withdrew cash from ATM and used that cash to purchase new shoes; court held evidence was relevant to the state's theory that shoe prints found in dirt near victim's body belonged to defendant and that he attempted to divert suspicion away from himself after killing victim).

State v. Lelevier, 250 Ariz. 165, 476 P.3d 713, ¶¶ 26–27 (Ct. App. 2020) (defendant contended trial court erred in admitting evidence that, in days before killing, victim's behavior was normal, energetic, and happy; court held evidence was relevant to state's theory that defendant had intended to frame victim's death as suicide, but abandoned plan after killing her when he realized story was implausible).

State v. Lelevier, 250 Ariz. 165, 476 P.3d 713, ¶¶ 28–29 (Ct. App. 2020) (defendant contended trial court erred in admitting evidence that defendant told officers he had been assaulted 11 days after victim's death; court held evidence was relevant to state's principal case because it showed defendant's efforts to divert attention of police away from himself and toward third party, and defendant's affirmative attempts to divert investigators from suspecting him were relevant to show his consciousness of his guilt).

State v. Togar, 248 Ariz. 567, 462 P.3d 1072, ¶¶ 19–21 (Ct. App. 2020) (97-year-old victim was in senior-living facility where someone was stealing money from him; as result, victim's daughter and son-in-law marked four $20 bills, photographed them, recorded serial numbers, and put them in victim's wallet, and installed a motion-sensor camera in victim's room; next day, camera recorded person in victim's room; search revealed three $20 bills were missing, and video showed defendant in victim's room; officer searched defendant and found three marked $20 bills; defendant contended trial court erred in admitting evidence of prior thefts from victim because there was no showing he was one who committed thefts; court held evidence of prior thefts was relevant because it showed reason victim's family acted as it did and helped jurors understand video evidence of defendant committing this crime and marked bills found on his person; further, absent evidence of prior thefts, family's conduct may have seemed irrational and paranoid, thus evidence substantiated their credibility as key prosecution witnesses, which court held was material and relevant on its own).

401.cr.020 For evidence to be relevant, it must satisfy two requirements: **Second,** the evidence must make the fact that is of consequence more or less probable (relevance).

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State v. Lelevier, 250 Ariz. 165, 476 P.3d 713, ¶¶ 26–27 (Ct. App. 2020) (defendant contended trial court erred in admitting evidence that, in days before killing, victim's behavior was normal, energetic, and happy; court held evidence was relevant to state's theory that defendant had intended to frame victim's death as suicide, but abandoned plan after killing her when he realized story was implausible.

State v. Lelevier, 250 Ariz. 165, 476 P.3d 713, ¶¶ 28–29 (Ct. App. 2020) (defendant contended trial court erred in admitting evidence that defendant told officers he had been assaulted 11 days after victim's death; court held evidence was relevant to state's principal case because it showed defendant's efforts to divert attention of police away from himself and toward third party, and defendant's affirmative attempts to divert investigators from suspecting him were relevant to show his consciousness of his guilt).

State v. Togar, 248 Ariz. 567, 462 P.3d 1072, ¶¶ 19–21 (Ct. App. 2020) (97-year-old victim was in senior-living facility where someone was stealing money from him; as result, victim's daughter and son-in-law marked four $20 bills, photographed them, recorded serial numbers, and put them in victim's wallet, and installed a motion-sensor camera in victim's room; next day, camera recorded person in victim's room; search revealed three $20 bills were missing, and video showed defendant in victim's room; officer searched defendant and found three marked $20 bills; defendant contended trial court erred in admitting evidence of prior thefts from victim because there was no showing he was one who committed thefts; court held evidence of prior thefts was relevant because it showed reason victim's family acted as it did and helped jurors understand video evidence of defendant committing this crime and marked bills found on his person; further, absent evidence of prior thefts, family's conduct may have seemed irrational and paranoid, thus evidence substantiated their credibility as key prosecution witnesses, which court held was material and relevant on its own).

401.cr.350 A photograph is admissible if relevant to an expressly or impliedly contested issue.

State v. Lelevier, 250 Ariz. 165, 476 P.3d 713, ¶¶ 19–22 (Ct. App. 2020) (defendant was convicted of first-degree murder; abandonment or concealment of dead body; sexual exploitation of minor under 15 years of age; surreptitious photographing, videotaping, filming, or digitally recording or viewing; and voyeurism; defendant contended trial court erred in admitting photograph of victim's body at crime scene, excluding her face, and photograph of victim's face; court held photographs were relevant to corroborate detective's testimony about manner of victim's death and on-scene investigative process, and admission of photographs would have been harmless in light of other evidence).

401.cr.420 Inaccuracies in a video go to the weight of the evidence, not its admissibility, and may be clarified through witness testimony.

State v. Smith, 250 Ariz. 69, 475 P.3d 558, ¶¶ 75–78 (2020) (court admitted PowerPoint and video showing location and movement of defendant's and victim's cell phones on day of murder; defendant contended video was misleading because CSLI can only show general location of cell phone (within 1½ miles of cell tower) and it cannot track specific path cell phone travels between cell towers; court noted any inaccuracies were clarified by detective's testimony).

Rule 401. Test for Relevant Evidence (Impeachment Cases).

401.imp.110 A party may not impeach a witness by implication, with facts that are not true, with facts that the party would not be able to prove, or by vague or speculative matters.

State v. Smith, 250 Ariz. 69, 475 P.3d 558, ¶¶ 82–91 (2020) (detective had been demoted because of time-keeping violations; defendant contended detective might have been motivated to testify unfavorably against him because detective "had every incentive to prove his value to the prosecution" and suggested detective testified against him to avoid being charged with theft, thus trial court abused discretion in precluding that testimony; court noted trial court gave defendant broad latitude in impeaching detective's credibility, and that defendant had no good-faith basis to support his claim that detective altered testimony in return for leniency from state and simply speculated that state may have tried to elicit favorable testimony from detective in exchange for leniency, and made no offer of proof that detective agreed to testify against defendant in return for leniency).

Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons (Criminal Cases).

403.cr.010 If evidence is relevant and therefore admissible, a trial court may not exclude that evidence unless the opposing party establishes that the evidence poses the danger of *unfair* prejudice, and establishes that the *unfair* prejudice *substantially* outweighs the probative value.

State v. Lelevier, 250 Ariz. 165, 476 P.3d 713, ¶ 30 (Ct. App. 2020) (defendant contended trial court erred in admitting evidence that defendant told officers he had been assaulted 11 days after victim's death; court stated trial court correctly noted that evidence of alleged assault had potential to be either exculpatory, in event jurors believed attack occurred, or to be directly inculpatory showing defendant's consciousness of guilt, thus any possible prejudice

introduced by this evidence was limited to threat that jurors would be more likely to find defendant guilty of the charged crimes, which is not forbidden by Rule 403).

403.cr.030 Because evidence that is relevant will generally be adverse to the opposing party, use of the word "prejudicial" to describe this type of evidence is incorrect and cannot be the basis for excluding evidence under this rule; evidence is "*unfairly* prejudicial" only if it has an undue tendency to suggest a decision on an improper basis, such as emotion, sympathy, or horror.

State v. Riley, 248 Ariz. 154, 459 P.3d 66, ¶¶ 70–71 (2020) (defendant contended evidence that victim had been in protective custody was not relevant; state argued that victim's time in protective custody made him target for AB hit; court held this established defendant's motive for killing victim, thus this evidence was relevant, and further held that, although such evidence likely undermined defendant's defense, it was not admitted to evoke emotion, sympathy, or horror, thus trial court did not err in admitting it).

State v. Togar, 248 Ariz. 567, 462 P.3d 1072, ¶¶ 22–24 (Ct. App. 2020) (97-year-old victim was in senior-living facility where someone was stealing money from him; as result, victim's daughter and son-in-law marked four $20 bills, photographed them, recorded serial numbers, and put them in victim's wallet, and installed a motion-sensor camera in victim's room; next day, camera recorded person in victim's room; search revealed three $20 bills were missing, and video showed defendant in victim's room; officer searched defendant and found three marked $20 bills; defendant contended trial court erred in admitting evidence of prior thefts from victim; court held this evidence was relevant, and because testimony about prior thefts from victim was limited, and state did not imply that defendant was responsible for prior thefts, court concluded evidence of prior thefts did not have undue tendency to suggest decisions based on emotion, sympathy, or horror thus could not conclude that explanatory value of prior thefts was substantially outweighed by danger of unfair prejudice).

403.cr.100 Once the trial court determines that a photograph has probative value, the trial court, if requested, must determine whether the photograph has any danger of unfair prejudice, and if so, whether the danger of unfair prejudice substantially outweighs the probative value.

State v. Lelevier, 250 Ariz. 165, 476 P.3d 713, ¶¶ 19–22 (Ct. App. 2020) (defendant was convicted of first-degree murder; abandonment or concealment of dead body; sexual exploitation of minor under 15 years of age; surreptitious photographing, videotaping, filming, or digitally recording or viewing; and voyeurism; defendant contended trial court erred in admitting photograph of victim's body at crime scene, excluding her face, and photograph of victim's face; court held photographs were relevant to corroborate detective's testimony about manner of victim's death and on-scene investigative process, and admission of photographs would have been harmless in light of other evidence; further considering other photographs admitted in evidence without objection, these additional photographs were unlikely to have any further inflammatory effect).

Rule 404(a)(2). Other crimes, wrongs, or acts—Character evidence generally—Character of the victim (Criminal Cases).

404.a.2.cr.010 The defendant in a criminal case is permitted to offer evidence of a trait of the victim's character provided that trait of character is pertinent to the litigation, such as when the defendant raises a justification defense.

State v. Zaid, 249 Ariz. 154, 467 P.3d 279, ¶¶ 18–21 (Ct. App. 2020) (defendant claimed self-defense, and because it was unclear who was first aggressor, court held evidence of victim's violent character was admissible and that trial court erred in excluding that evidence).

404.a.2.cr.013 When a criminal defendant raises a justification defense, the defendant is entitled to offer proof of the victim's reputation for violence, even if the defendant did not know about that character.

State v. Zaid, 249 Ariz. 154, 467 P.3d 279, ¶¶ 18–21 (Ct. App. 2020) (defendant claimed self-defense, and because it was unclear who was first aggressor, court held evidence of victim's violent character was admissible even though defendant did not know of victim's violent character, and thus trial court erred in excluding that evidence).

404.a.2.cr.017 If the defendant offers evidence of a trait of the victim's violent character or claims self-defense, the state may offer evidence of the victim's peaceful character.

State v. Riley, 248 Ariz. 154, 459 P.3d 66, ¶¶ 65–69 (2020) (court held that, because defendant never admitted he killed victim, in self-defense or otherwise, and claimed instead he found victim dead in his cell and tried to revive him, victim's character for peacefulness was not admissible, thus trial court erroneously admitted evidence of victim's character, but concluded any error was harmless).

Rule 404(b). Other crimes, wrongs, or acts (Criminal Cases).

404.b.cr.103 If evidence shows someone other than the defendant committed the other act, then Rule 404(b) does not apply.

State v. Togar, 248 Ariz. 567, 462 P.3d 1072, ¶¶ 12–19 (Ct. App. 2020) (97-year-old victim was in senior-living facility where someone was stealing money from him; as result, victim's daughter and son-in-law marked four $20 bills, photographed them, recorded serial numbers, and put them in victim's wallet, and installed a motion-sensor camera in victim's room; next day, camera recorded person in victim's room; search revealed three $20 bills were missing, and video showed defendant in victim's room; officer searched defendant and found three marked $20 bills; defendant contended trial court erred in admitting evidence of prior thefts from victim because there was no showing he was one who committed thefts; court held that, because there was no claim that defendant committed prior thefts from victim, Rule 404(b) did not apply, and admissibility would be determined under Rule 401).

404.b.cr.200 Extrinsic evidence of another crime, wrong, or act is admissible if it shows **credibility**.

State v. Zaid, 249 Ariz. 154, 467 P.3d 279, ¶¶ 12–17 (Ct. App. 2020) (court stated evidence of victim's other acts was admissible for credibility to show defendant's version of events was credible, but that defendant did not point to any details of victim's prior violent conduct that presented substantial similarities to defendant's account, nor did defendant claim to have

recounted specific similarities before he had opportunity to fabricate account consistent with them, and thus held defendant did not show that victim's prior violent acts were relevant to corroborate his version of events and rebut claim of fabrication).

404.b.cr.250 **Extrinsic** evidence of another crime, wrong, or act is admissible if it is relevant to show **motive**.

State v. Lelevier, 250 Ariz. 165, 476 P.3d 713, ¶¶ 11–14 (Ct. App. 2020) (defendant was convicted of first-degree murder; abandonment or concealment of dead body; sexual exploitation of minor under 15 years of age; surreptitious photographing, videotaping, filming, or digitally recording or viewing; and voyeurism; defendant contended trial court erred in admitting evidence that, 2 months prior to her death, victim caught defendant taking photograph of her while she was partially dressed in her bathroom; trial court reasoned evidence went to defendant's motive and intent to kill victim and supported his knowledge, plan, and lack of mistake when engaging in conduct leading to charges of voyeurism, sexual exploitation of minor, and surreptitious photographing; court held that, even had trial court erred in admitting this evidence, any error was harmless given overwhelming evidence of defendant's other surreptitious surveillance).

404.b.cr.800 Depending on the nature of the crime charged and nature of the other crime, wrong, or act, admission of evidence of the other crime, wrong, or act may be harmless error.

State v. Lelevier, 250 Ariz. 165, 476 P.3d 713, ¶¶ 11–14 (Ct. App. 2020) (defendant was convicted of first-degree murder; abandonment or concealment of dead body; sexual exploitation of minor under 15 years of age; surreptitious photographing, videotaping, filming, or digitally recording or viewing; and voyeurism; defendant contended trial court erred in admitting evidence that, 2 months prior to her death, victim caught defendant taking photograph of her while she was partially dressed in her bathroom; trial court reasoned evidence went to defendant's motive and intent to kill victim and supported his knowledge, plan, and lack of mistake when engaging in conduct leading to charges of voyeurism, sexual exploitation of minor, and surreptitious photographing; court held that, even had trial court erred in admitting this evidence, any error was harmless given overwhelming evidence of defendant's other surreptitious surveillance).

ARTICLE 5. PRIVILEGES

Rule 501. Privilege in General.

05. Right to Information Protected by a Privilege.

501.05.020 For information not subject to *Brady,* the physician-patient privilege does not yield to the request of a criminal defendant for information merely because that information may be helpful to the defendant's defense; to be entitled to an *in camera* review of privileged records as a matter of due process, the defendant must establish a [reasonable possibility] [substantial probability] that the protected records contain information critical to an element of the charge or defense, or that their unavailability would result in a fundamentally unfair trial.

Fox-Embrey v. Neal (Main), 249 Ariz. 162, 467 P.3d 1102, ¶¶ 17–63 (Ct. App. 2020) (defendant was charged with capital murder and multiple counts of child abuse as result of other children being undernourished; court noted defendant had specifically identified kinds of records she was seeking and had provided concrete basis for obtaining *in camera* review of those records, and taking that fact together with fact that state was seeking sentence of death [which it concluded provided broader basis for determining whether respondent judge erred in finding defendant did not satisfy applicable disclosure test], court concluded defendant sustained her burden of establishing a reasonable possibility that the protected records contain critical information, thus showing she was entitled to *in camera* review of medical and therapeutic records contained within DCS file that had not yet been disclosed so that respondent judge may determine whether they contained information to which defendant was entitled as matter of due process). **Rev. continued 2/02/2021.**

State v. Dunbar, 249 Ariz. 37, 465 P.3d 527, ¶¶ 23–29 (Ct. App. 2020) (defendant claimed trial court denied him his due process rights when it denied his request for victim's medical records from Pennsylvania, Maryland, and Arizona, contending victim had mental health history that extended over 15 years and had been diagnosed with severe depression and bipolar disorder, had a family history of schizophrenia, and history of not taking medication, being paranoid, and being delusional and dishonest, and further claimed personal knowledge that victim did not take her medication often and her mental conditions had her creating illusions, which may affect her testimony and identification; court held defendant did not provide sufficiently specific basis for requiring victim to produce her medical records and thus failed to establish a reasonable possibility that the protected records contain critical information because defendant's request was nothing more than conclusory assertion that victim's medical records could contain exculpatory information, noting that defendant did not explain how broad assertion that victim was "delusional" would support his misidentification defense, and more importantly, at trial defendant abandoned his proposed claim of misidentification, instead arguing self-defense, and offered no explanation how victim's medical records would be relevant to issue of whether his actions in shooting her were justified, and thus had no apparent relationship to defense actually presented). **Rev. denied 12/15/2020.**

R.S. v. Thompson (Vanders), 247 Ariz. 575, 454 P.3d 1010, ¶¶ 9–28 (Ct. App. 2019) (defendant was charged with second-degree murder; on his request, trial court ordered hospital to disclose deceased victim's privileged mental health records for *in camera* review; court held that, because defendant did not establish substantial probability that protected records contained information critical to element of charge or defense, or that their unavailability would result in fundamentally unfair trial, trial court erred by granting *in camera* review of victim's privileged records). **Rev. granted 8/25/2020.**

07. Attorney-Client.

501.07.045 A party claiming the attorney-client privilege must make a prima facie showing supporting that claim; upon such a showing, the trial court may hold a hearing to determine whether the privilege applies, but the court may not invade the privilege to determine its existence, even *in camera* using a special master; once the privilege has been established, a party attempting to set it aside under the crime-fraud exception must demonstrate a factual basis adequate to support a good faith belief by a reasonable person that *in camera* review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies; only then may a special master review the privileged communications.

Clements v. Bernini, 249 Ariz. 434, 471 P.3d 645, ¶¶ 8–18 (2020) (case arose from trial court's order appointing special master to conduct *in camera* review of recordings of jail phone calls made by defendant, who was incarcerated in Maricopa County jail).

09. Behavioral Health Professional-Client.

501.09.010 The confidential relationship between a client and a licensee, including a temporary licensee, is the same as between an attorney and a client, and unless a client waives this privilege in writing or in court testimony, a licensee shall not voluntarily or involuntarily divulge information that is received by reason of the confidential nature of the behavioral health professional-client relationship.

In re MH2019–004895, 249 Ariz. 283, 468 P.3d 1244, ¶¶ 6–17 (Ct. App. 2020) (Appellant received outpatient mental health services at behavioral health center, and her clinical liaison was professional counselor (M.S.) licensed by Arizona Board of Behavioral Health Examiners; when appellant became highly agitated and was taken to emergency department after becoming physically violent with staff, petition for court-ordered treatment was filed; court held trial court erred in permitting M.S. to testify about information Appellant relayed to her as part of their confidential relationship, including information relative to her mental condition that M.S. obtained from observing Appellant's behavior).

17. Litigation.

501.17.010 A party to a private litigation is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as part of, a judicial proceeding in which the party participates, if the matter has some relation to the proceeding.

Goldman v. Sahl, 248 Ariz. 512, 462 P.3d 1017, ¶¶ 17–20 (Ct. App. 2020) (plaintiff contended trial court erred by not allowing jurors to determine whether defamatory statements were preliminary to litigation that was immediate or imminent; court rejected plaintiff's contention because it would convert all pre-filing settlement negotiation communication, communication with witness or expert, and even non-privileged communication with client, into factual dispute for jurors to determine whether attorney was seriously considering litigation, or just "posturing").

28. Waiver by Conduct.

501.28.010 The party claiming a person has waived a privilege by conduct has the burden of proving that waiver by conduct.

Heaphy v. Metcalf (Willow Canyon), 249 Ariz. 210, 468 P.3d 763, ¶ 4 (Ct. App. 2020) (husband died while in care of Willow Canyon (WC); wife filed wrongful death action grounded in medical malpractice; WC sought discovery of beneficiaries' medical records; court held WC failed to show waiver of privilege).

501.28.020 In determining whether a party through litigation has waived a privilege, Arizona has adopted an intermediate test, under which waiver exists when: (1) The assertion of the privilege was the result of some affirmative act, such as filing suit or raising an affirmative defense, by the asserting party; (2) through this affirmative act, the asserting party has put the protected information at issue by making it relevant to the case; and (3) application of the privilege would have denied the opposing party access to information vital to that party's case; Arizona has thus rejected the most restrictive test, which requires a showing that the party has either expressly waived the privilege or has impliedly waived it by directly injecting knowledge from a privileged source into the litigation, and the least restrictive test, which requires a showing that the party has asserted a claim, counter-claim, or affirmative defense that raises a matter to which otherwise privileged material is relevant; further, the attorney-client privilege is waived for any relevant communication if the client asserts for any material issue in the proceeding that the client acted upon the advice of a lawyer or that the legal advice was otherwise relevant to the legal significance of the client's conduct.

Heaphy v. Metcalf (Willow Canyon), 249 Ariz. 210, 468 P.3d 763, ¶¶ 3–10 (Ct. App. 2020) (husband died while in care of Willow Canyon (WC); wife filed wrongful death action grounded in medical malpractice; WC sought discovery of beneficiaries' medical records; wife and beneficiaries asserted they had not waived physician-patient privilege for those records and that records were not "relevant to life expectancy"; trial court permitted discovery of some recent records determining that, because beneficiaries had claimed ongoing loss of companionship by decedent, their life expectancies were at issue in case and their medical records could be relevant to that issue; court held merely placing one's general health at issue is insufficient to waive medical privilege and instead privilege holder must make assertion about, or present evidence about, particular condition before waiver may be implied, and because no such condition was present here, there had been no implied waiver of physician-patient privilege).

ARTICLE 6. WITNESSES

Rule 602. Need for Personal Knowledge.

602.015 In essence, Rule 602 permits a witness's observation testimony.

State v. Riley, 248 Ariz. 154, 459 P.3d 66, ¶¶ 72–74 (2020) (defendant contended trial court erred in allowing corrections officer to testify that, on the night of killing, as defendant and another inmate were exiting C Pod, she saw defendant pat inmate on shoulder "kind of atta-boying him" and that defendant looked "happy"; court held that officer's testimony was based on her own perception and her characterization of pat on back and smile as congratulatory gesture was unremarkable).

Rule 609(a). Impeachment by Evidence of a Criminal Conviction—In General.

609.a.1.050 An open-ended offense is considered a felony for impeachment purposes until it is designated a misdemeanor.

Brown v. Dembow, 248 Ariz. 374, 460 P.3d 1258, ¶¶ 6–16 (Ct. App. 2020) (in March 2015, defendant pled guilty to possession of drug paraphernalia, class 6 undesignated offense; November 2015, she drove into decedent killing him; August 2016, court designated drug offense as misdemeanor; at wrongful death trial October 2018, plaintiffs sought to impeach defendant's testimony with her drug conviction, but trial court would not allow it; court held that, because drug offense had been designated misdemeanor prior to 2018 wrongful death trial, defendant was not convicted felon at time of that trial, thus trial court properly ruled she was not subject to impeachment with that prior drug conviction).

Rule 615. Excluding Witnesses.

615.027 Although a victim has the right to be present throughout all criminal proceedings in which the defendant has the right to be present, if a victim from a prior proceeding is going to called as a witness in a subsequent proceeding pursuant to Rule 404(c), that victim is subject to exclusion under Rule 615.

State v. Hamilton, 249 Ariz. 303, 468 P.3d 1264, ¶¶ 14–26 (Ct. App. 2020) (defendant was charged with sexual conduct with minor and six counts of molestation of child; state gave notice it intended to call three women under Rule 404(c) from 2000 case; trial court denied defendant's request to interview those women; court held that, because defendant was still under obligation to register as sex offender in 2000, women were still considered "victims" and thus had right to refuse to be interviewed, but were subject to exclusion under Rule 615; court concluded, however, that any error in allowing them to be present was harmless).

ARTICLE 7. OPINION AND EXPERT TESTIMONY

Rule 701(a). Opinion Testimony by Lay Witnesses—Rationally based on the witness's perception.

701.a.010 A witness who is not testifying as an expert may give testimony in the form of an opinion only if the opinion is rationally based on the witness's perception.

State v. Riley, 248 Ariz. 154, 459 P.3d 66, ¶ 75 (2020) (defendant contended trial court erred in allowing corrections officer to testify that, on the night of killing, as defendant and another inmate were exiting C Pod, she saw defendant pat inmate on shoulder "kind of atta-boying him" and that defendant looked "happy"; court held that officer's testimony was rationally based on her own perception that defendant's smile and pat on back was congratulatory).

Rule 701(b). Opinion Testimony by Lay Witnesses—Helpful to understand clearly the witness's testimony or to determining a fact in issue.

701.b.020 A witness who is not testifying as an expert may give testimony in the form of an opinion only if the opinion would be helpful to clearly understanding the witness's testimony or to determining a fact in issue, and not merely tell the trier-of-fact how to decide the case.

State v. Riley, 248 Ariz. 154, 459 P.3d 66, ¶ 76 (2020) (defendant contended trial court erred in allowing corrections officer to testify that, on the night of killing, as defendant and another inmate were exiting C Pod, she saw defendant pat inmate on shoulder "kind of atta-boying him" and that defendant looked "happy"; court held that, because defendant contended he was in housing pod night of murder to warn victim of killing plot and that he panicked once he saw victim was dead, officer's testimony assisted jurors in determining this fact because her description of defendant's behavior was inconsistent with panicked person (as defendant claimed to be) and tended to prove state's theory of case; further, contrary to defendant's claim, jurors were not in same position as officer to discern significance of defendant's "atta-boy" or "happy" expression because she was only percipient witness to interaction; thus trial court did not err in admitting officer's testimony).

Rule 702. Testimony by Expert Witnesses.

702.008 The trial court has discretion whether to set a pre-trial hearing to evaluate proposed expert testimony and may properly decide to hear the evidence and objections during the trial.

State v. Conner, 249 Ariz. 121, 467 P.3d 246, ¶ 31 (Ct. App. 2020) (defendant contended trial court erred by failing to complete pre-trial evidentiary hearing before determining expert's testimony was admissible and should have allowed defendant to complete his cross-examination at that hearing; court noted trial courts have discretion to hold pre-trial evidentiary hearing to address admissibility of expert witness testimony and that defendant had opportunity to cross-examine expert at trial; and held defendant failed to show any error in pre-trial evidentiary proceedings affected admissibility of expert's testimony).

Rule 702(a). Assist trier of fact.

702.a.050 Although an expert may not give an opinion about the accuracy, reliability, truthfulness, or credibility of another person or witness, a witness may disclose to jurors those facts that caused the witness not to believe the other person or witness.

State v. Smith, 250 Ariz. 69, 475 P.3d 558, ¶¶ 134–35 (2020) (court held it was not improper for state's expert to question defendant's expert's qualifications or his conclusions about affect prior abuse had on defendant).

Rule 702(b). Testimony based on sufficient facts or data.

702.b.010 A witness who is qualified as an expert may testify in the form of an opinion or otherwise if the testimony is based on sufficient facts or data.

State v. Conner, 249 Ariz. 121, 467 P.3d 246, ¶¶ 25–28 (Ct. App. 2020) (state's expert testified about cell phone information, defendant claimed expert's opinion was based on insufficient facts and data, and thus inadmissible, specifically contending expert lacked key for T-Mobile cell site location information (CSLI), Azimuth information, switch information, key to second set of CSLI, and location information of "TracFone"; court noted expert's trial testimony included explaining how he reached his conclusion and opportunity for significant cross-examination by defendants, and further noted, during that cross-examination, he was never asked about this information and was never asked how any lack of information affected his opinions, and more specifically, cross-examination did not address how missing Azimuth information or key to either set of CSLI affected his opinions, and further noted that, at no point, during pre-trial hearing or at trial, did defendant challenge quality of expert's opinions because he lacked this other data; court held defendant failed to show facts and data available to expert were so insufficient that it rendered his opinion inadmissible).

Rule 702(d) — Reliably applied principles and methods.

702.d.010 A witness who is qualified as an expert may testify in the form of an opinion or otherwise if the expert has reliably applied the principles and methods to the facts of the case.

State v. Conner, 249 Ariz. 121, 467 P.3d 246, ¶¶ 29–30 (Ct. App. 2020) (defendant noted state's cell phone expert was state's third cell phone expert and that each expert had analyzed same data and applied essentially same methodology, but had come to different conclusions, and thus contended expert's opinion lacked key element of being reliable; court stated that, other than broadly claiming state's experts came to different conclusions over time, defendant failed to show what flaws in expert's work made his opinions unreliable, and that mere differences in conclusions do not require preclusion of expert evidence, leaving it to jurors to determine weight and credibility of testimony; and thus held defendant failed to show expert's testimony was so unreliable that it required exclusion).

ARTICLE 8. HEARSAY

Rule 801 — Statements that are not hearsay.

801.005 In order for an out-of-court statement to be considered "testimonial evidence," the declarant must have made the statement to an agent of the state.

State v. Stuebe, 249 Ariz. 127, 467 P.3d 252, ¶¶ 14–15 (Ct. App. 2020) (triggered by motion detector, security camera recorded burglary in progress and sent email and video recording to security company; court noted email and video recording were not sent to law enforcement and that defendant was able to cross-examine property manager about email and video recording, and thus held admission of email and video recording did not violate defendant's confrontation rights).

801.006 In order for an out-of-court statement to be considered "testimonial evidence," the declarant must have made the statement for the purpose of litigation or under circumstances the declarant would reasonably expect to be used prosecutorially.

State v. Stuebe, 249 Ariz. 127, 467 P.3d 252, ¶¶ 14–15 (Ct. App. 2020) (triggered by motion detector, security camera recorded burglary in progress and sent email and video recording to security company; court noted email and video recording were not made in anticipation of criminal prosecution and that defendant was able to cross-examine property manager about email and video recording, and thus held admission of email and video recording did not violate defendant's confrontation rights).

Rule 801(a) — Statements that are not hearsay; Statement.

801.a.003 "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion, and "person" as defined in A.R.S. § 1–215(28) and § 13–105(30) does not include an automated email or a "machine-produced" video recording attached to the email.

State v. Stuebe, 249 Ariz. 127, 467 P.3d 252, ¶¶ 1, 9–12 (Ct. App. 2020) (triggered by motion detector, security camera recorded burglary in progress and sent email and video recording to security company; defendant contended email and video were hearsay; court held automated email and machine producing video were not "person," thus email and video recording attached to email were not hearsay because they were not made by person).

Rule801(d)(2)(A) —Statements that are not hearsay: Party-opponent's own admission.

801.d.2.A.060 The *corpus delicti* doctrine ensures a defendant's conviction is not based upon an uncorroborated confession or incriminating statement, thus state must show (1) a certain result has been produced, and (2) the result was caused by criminal action rather than by accident or some other non-criminal action; only a reasonable inference of the *corpus delicti* need exist before the jurors may consider the statement, and circumstantial evidence may support such an inference; furthermore, the state need not present evidence supporting the inference of *corpus delicti* before it submits the defendant's statement as long as the state ultimately submits adequate proof of the corpus delicti before it rests.

State v. Gill, 248 Ariz. 274, 459 P.3d 1209, ¶¶ 7–8 (Ct. App. 2020) (defendant contended his possession of methamphetamine was not proved because no evidence corroborated his admission that he possessed "less than a quarter gram" of methamphetamine within the residence; court noted there was considerable evidence corroborating defendant's admission and sup-

porting his conviction: In area of the residence with defendant's possessions, police found methamphetamine pipe and bag containing syringe; a few steps from that area was bag containing methamphetamine and various drug paraphernalia including packaging seals, syringes, and another methamphetamine pipe; court thus held there was substantial evidence in addition to defendant's incriminating statements from which jurors could find beyond reasonable doubt that he possessed methamphetamine found in residence).

Rule 804(b)(1). Exceptions to the Rule Against Hearsay—When the Declarant Is Unavailable as a Witness — Former testimony.

804.b.1.020 An exception to the confrontation clause exists when the witness is unavailable but has previously testified at a judicial proceeding, subject to cross-examination, against the same defendant.

State v. Sahagun-Llamas, 248 Ariz. 120, 458 P.3d 875, ¶ 31 (Ct. App. 2020) (trial court held trial lasting 7 days; after defendant testified, he absconded and was subsequently arrested 13 years later; upon review, it was discovered court reporter had not transcribed 4th day of trial (when two of defendant's witnesses testified); neither trial court nor attorneys could recall what testimony was that day; court concluded trial court's efforts to reconstruct record were not sufficient for meaningful appeal, and so ordered new trial; court stated that, for any witness state might be unable to locate for second trial, state could use transcribed testimony from first trial).

ARTICLE 9. AUTHENTICATION AND IDENTIFICATION

Rule 901(a). Authenticating and Identifying Evidence — General provision.

901.a.010 For the matter in question to be admissible in evidence, the proponent need only present sufficient evidence from which the trier-of-fact could conclude the matter in question is what the proponent claims it to be; whether the matter in question is in fact what the proponent claims and whether it is connected to the litigation is a question of weight and not admissibility, and is for the trier-of-fact.

State v. Stuebe, 249 Ariz. 127, 467 P.3d 252, ¶ 13 (Ct. App. 2020) (triggered by motion detector, security camera recorded burglary in progress and sent email and video recording to security company; defendant contended email and video were hearsay; court held automated email and "machine-produced" video recording attached to email were not hearsay because they were not made by "person"; trial court denied defendant's authentication objection to video, but defendant did not raise that issue on appeal).

April 7, 2021

ARTICLE III. RIGHTS OF PARTIES.

RULE 6. ATTORNEYS, APPOINTMENT OF COUNSEL.

Rule 6.1(a) Rights to counsel; right to a court-appointed attorney; waiver of the right to counsel—Right to be represented by counsel.

6.1.a.020 In determining whether to grant a continuance so that a defendant may be represented by retained counsel of the defendant's choosing, the trial court should consider such factors as: whether other continuances were granted; whether the defendant had other competent counsel prepared to try the case; the convenience or inconvenience to the litigants, counsel, witnesses, and the court; the length of the requested delay; the complexity of the case; and whether the requested delay was for legitimate reasons or was merely dilatory.

State v. Raffaele, 249 Ariz. 474, 471 P.3d 685, ¶¶ 22–26 (Ct. App. 2020) (defendant committed offense in 2013; in August 2014, defendant failed to appear, and trial court issued bench warrant; defendant was arrested in April 2017; in September 2017, 2 weeks before trial was scheduled to begin, defendant requested continuance so he could hire new counsel; trial court denied motion, noting defendant failed to provide any evidence to suggest his current attorney could not properly represent him at trial and stating defendant could retain his desired new attorney if she could be prepared by set trial date; court concluded trial court did not err, noting (1) charges against defendant had been pending since August 2013 and defendant was rearrested April 2017, and that, within that period, defendant could have retained counsel but failed to do so, and instead, waited until 2 weeks before trial was scheduled to begin to ask for a continuance; (2) trial court noted inconvenience to arresting officer of trial were delayed; and (3) defendant was represented by competent counsel, so much so trial superior court felt compelled to note that his representation "was nothing short of outstanding").

Rule 6.1(b) Rights to counsel; right to a court-appointed attorney; waiver of the right to counsel—Right to a court appointed attorney.

6.1.b.050 When a defendant makes specific factual allegations that raise a colorable claim that the defendant has an irreconcilable conflict with appointed counsel, the trial court has a duty to inquire into the basis of the defendant's request for substitution of counsel, and during this inquiry, the defendant bears the burden of proving either a complete breakdown in communication or an irreconcilable conflict; to satisfy this burden, the defendant must present evidence of a severe and pervasive conflict with his attorney or evidence that he had such minimal contact with the attorney that meaningful communication was not possible.

State v. Riley, 248 Ariz. 154, 459 P.3d 66, ¶¶ 7–23 (2020) (defendant and his attorney alleged communication between defendant and counsel ceases to exist; after hearing on that allegation, trial court found defendant failed to demonstrate irreconcilable conflict or completely fractured relationship with his attorney, and denied request to change counsel; court concluded record supported trial court's decision and thus trial court was not required to appoint new counsel).

State v. Johnson, 250 Ariz. 230, 477 P.3d 689, ¶¶ 5–16 (Ct. App. 2020) (defendant contended he had been denied his right to waive assistance of counsel and proceed *pro se*; court stated defendant's request to proceed *pro se* triggers trial court's protective duty to ascertain whether waiver of counsel is intelligent, knowing, and voluntary, and held that, "because the denial of the right to proceed *pro se* by refusing to permit a defendant to waive counsel, without further inquiry, violates his constitutional rights and is reversible error, [defendant's] conviction and sentence are vacated").

Rule 6.1(c) Rights to counsel; right to a court-appointed attorney; waiver of the right to counsel—Waiver of the right to counsel.

6.1.c.100 The right to counsel under both the United States and Arizona Constitutions includes an accused's right to proceed without counsel and with self-representation, and to invoke this right, a defendant must waive his or her right to counsel in a timely and unequivocal manner.

State v. Dunbar, 249 Ariz. 37, 465 P.3d 527, ¶¶ 5–18 (Ct. App. 2020) (before trial, defendant elected to represent himself, and trial court appointed attorney to act in advisory capacity; year later, advisory counsel advised trial court that defendant might want her to represent him; at next hearing, defendant said he wanted advisory counsel to represent him once he received results of special action he had filed, and trial court allowed defendant to continue to represent himself; at next hearing, advisory counsel advised trial court that defendant wanted her to represent him, and trial court appointed advisory counsel as lead counsel, but during hearing, defendant said he wanted to represent himself, so trial court again allowed self-representation; less than week later, defendant filed motion prepared by advisory counsel and signed by him that he was waiving right of self-representation and asking trial court to reappoint advisory counsel; on morning of trial before jurors had been empaneled, defendant attempted to raise another motion on his own behalf, but trial court would not allow it; on appeal, defendant argued trial court committed structural error by denying his request to represent himself on morning of trial; court held defendant forfeited his right to self-representation through his vacillating positions.).

6.1.c.200 When a criminal defendant is mentally competent to stand trial, but lacks the mental capacity to conduct that trial or a hearing, the superior court, in its sound discretion and over the defendant's objection, may appoint counsel and deny the defendant the right to self-representation.

State v. Ibeabuchi, 248 Ariz. 412, 461 P.3d 432, ¶¶ 1, 14–23 (Ct. App. 2020) (defendant's (1) answers were not responsive to trial court's questions and some things he said were at variance with what was on record, (2) answers to trial court's questions at times were nonresponsive and showed he did not understand history of his case, (3) exchange with trial court showed his misunderstanding of law, and (4) noncompliance with court orders requiring transportation to court for probation violation hearings illustrated defendant lacked mental state required to represent himself; thus court held trial court did not abuse its discretion in determining defendant was gray-area defendant unable to defend himself competently in his own probation violation hearing and in appointing counsel to undertake his representation over defendant's objection). **(rev. granted)**

RULE 7. RELEASE.

Rule 7.4(b) Procedure—Later review of conditions.

7.4.b.060 A defendant who is on bond or on own recognizance for one offense who is then arrested and is in custody for a second offense is still considered on release for first offense.

State v. Moreno, 249 Ariz. 593, 473 P.3d 722, ¶¶ 4–12 (Ct. App. 2020) (defendant was arrested, charged with felony offenses, and released on bond; 2 months later, officers contacted defendant while responding to "check welfare" call, discovered he had outstanding misdemeanor warrant, and took him into custody; after officer removed defendant's handcuffs to fingerprint him, defendant pulled his arm away from officer and began yelling and running around room; when officers caught defendant, he kicked and fought with them until they eventually subdued him; defendant was convicted of resisting arrest, and trial court imposed additional 2 years on sentence; defendant contended he was no longer on release when he committed subsequent offense; court held no court had modified release conditions for first offense, so he was still on release for that offense when he committed second offense).

Rule 7.5(d) Review of conditions; revocation of release—Hearing; modification of conditions; revocation.

7.5.d.010 A defendant who is on bond or on own recognizance for one offense who is then arrested and is in custody for a second offense is still considered on release for first offense.

State v. Moreno, 249 Ariz. 593, 473 P.3d 722, ¶¶ 4–12 (Ct. App. 2020) (defendant was arrested, charged with felony offenses, and released on bond; 2 months later, officers contacted defendant while responding to "check welfare" call, discovered he had outstanding misdemeanor warrant, and took him into custody; after officer removed defendant's handcuffs to fingerprint him, defendant pulled his arm away from officer and began yelling and running around room; when officers caught defendant, he kicked and fought with them until they eventually subdued him; defendant was convicted of resisting arrest, and trial court imposed additional 2 years on sentence; defendant contended he was no longer on release when he committed subsequent offense; court held no court had modified release conditions for first offense, so he was still on release for that offense when he committed second offense).

Rule 10.3(b) Changing the place of trial—Prejudicial pretrial publicity.

10.3.b.010 A defendant is entitled to a change of venue if there is a probability the dissemination of prejudicial information will deprive the defendant of a fair and impartial trial.

State v. Bolivar, 250 Ariz. 213, 477 P.3d 672, ¶¶ 18–33 (Ct. App. 2020) (after impaneling jurors, trial court admonished them not to do any independent research about case and emphasized need to evaluate case based solely upon what happened at trial; next morning, trial court learned two armed men had attacked victim's mother causing physical injuries; parties agreed to short continuance; trial court later revoked defendant's release; day before trial was scheduled to resume, defendant filed motions for change of venue and mistrial based on newspaper article published after jurors were impaneled, which reported trial court's finding defendant was responsible for attacks on victim's mother and showed photograph of defendant being handcuffed, and asked trial court to question jurors individually, which trial court denied; after trial resumed, trial court learned juror 5 had heard about article; trial court questioned juror 5, who said he saw the newspaper headline and defendant's picture, but said he

had not communicated with any other juror and did not think article would influence him; trial court again denied defendant's request to question jurors individually, and all parties agreed juror 5 would be selected as alternate; court held trial court's obligation to question jurors individually exists only during juror *voir dire* and not during trial, and thus trial court did not abuse discretion in denying defendant's request).

ARTICLE IV. PRETRIAL PROCEDURES.

RULE 13. INDICTMENT AND INFORMATION.

Rule 13.4(a) Severance—Generally.

13.4.a.030 Before severance of the trials of codefendants is required, the defendant must show the presence or absence of the following unusual features of the offense that might prejudice the defendant: (1) Evidence admitted against one defendant is facially incriminating to the other defendant, such as when one defendant's confession implicates the other; (2) evidence admitted against one defendant has a harmful rub-off effect on the other defendant; (3) there is a significant disparity in the amount of evidence introduced against defendants; or (4) codefendants present antagonistic, mutually exclusive defenses or a defense that is harmful to the codefendant.

State v. Jaramillo, 248 Ariz. 329, 460 P.3d 321, ¶¶ 11–13 (Ct. App. 2020) (co-defendants moved to sever cases, maintaining each would present antagonistic, mutually exclusive defenses, specifically arguing each would "shift the blame" by asserting other was "the source of the heroin and the person in charge"; court noted defendant's defense was he was merely struggling shopkeeper who had rented space in back room of his shop to co-defendant to store some tools, and he had no knowledge co-defendant was actually "warehousing drugs" there or "dealing drugs out of his store"; conversely, co-defendant's defense was that defendant was drug supplier and took advantage of co-defendant, who had been "nothing more than a delivery driver" for defendant, with no knowledge he was delivering defendant's drugs; court held jurors could not rationally accept both theories, which is hallmark of antagonistic, mutually exclusive defenses, thus defendant was entitled to new trial).

13.4.a.090 Before severance of the trials of codefendants is required, the defenses of the codefendants must be irreconcilable; they must be antagonistic to the point of being mutually exclusive so that the jurors could not believe both.

State v. Jaramillo, 248 Ariz. 329, 460 P.3d 321, ¶¶ 11–13 (Ct. App. 2020) (co-defendants moved to sever cases, maintaining each would present antagonistic, mutually exclusive defenses, specifically arguing each would "shift the blame" by asserting other was "the source of the heroin and the person in charge"; court noted defendant's defense was he was merely struggling shopkeeper who had rented space in back room of his shop to co-defendant to store some tools, and he had no knowledge co-defendant was actually "warehousing drugs" there or "dealing drugs out of his store"; conversely, co-defendant's defense was that defendant was drug supplier and took advantage of co-defendant, who had been "nothing more than a delivery driver" for defendant, with no knowledge he was delivering defendant's drugs; court held jurors could not rationally accept both theories, which is hallmark of antagonistic, mutually exclusive defenses, thus defendant was entitled to new trial).

Rule 13.5(b) Amending charges; defects in the charging document—Altering the charges; amending to conform to the evidence.

13.5.b.030 The state may move to amend the charging document as long as the amendment does not change the nature of the offense or does not prejudice the defendant.

State v. Porter, 248 Ariz. 392, 460 P.3d 1276, ¶¶ 24–27 (Ct. App. 2020) (information charged resisting arrest under § 13–2508(A)(2); over defendant's objection, trial court gave jury instruction that defined resisting arrest under both § 13–2508(A)(1) and (A)(2); court held defendant was not prejudiced because language in information alleged violation under (A)(1)).

13.5.b.040 The trial court may amend the charging document to correct formal or technical defects.

State v. Bolivar, 250 Ariz. 213, 477 P.3d 672, ¶¶ 37–48 (Ct. App. 2020) (Count 1 of information charged defendant with continuous sexual abuse of child under § 13–1417 committed between 5/07/2006 and 5/06/2014; Count 2 charged him with sexual conduct with minor committed 5/07/2006 and 5/06/2010; Count 9 charged him with molestation of a child committed between 5/07/2013 and 5/06/2014; trial court was concerned with violation of 13–1417(D) and proposed instructing jurors they could find defendant guilty of Counts 1 or 2 but not both and Counts 1 and 9 but not both; defendant objected; jurors found defendant guilty of all counts except Count 1; defendant contended his convictions for Counts 2 and 9 should be vacated because these charges were invalid for not being charged as alternate counts to Count 1 in information; court held amendment of charging document may remedy noncompliance with 13–1417(D) and that trial court's actions effectively amended information, and noted Rule 13.5(b) provides charges may be amended to correct mistakes of fact or remedy formal or technical defects, and defect in charging document is formal or technical and thus may be corrected through amendment when its amendment does not change nature of the offenses or otherwise prejudice defendant).

RULE 15. DISCOVERY.

Rule 15.1(g) The state's disclosure—Disclosure by court order.

15.1.g.040 For information not subject to *Brady,* the physician-patient privilege does not yield to the request of a criminal defendant for information merely because that information may be helpful to the defendant's defense; to be entitled to an *in camera* review of privileged records as a matter of due process, the defendant must establish a [reasonable possibility] [substantial probability] that the protected records contain information critical to an element of the charge or defense, or that their unavailability would result in a fundamentally unfair trial.

Fox-Embrey v. Neal (Main), 249 Ariz. 162, 467 P.3d 1102, ¶¶ 17–63 (Ct. App. 2020) (defendant was charged with capital murder and multiple counts of child abuse as result of other children being undernourished; court noted defendant had specifically identified kinds of records she was seeking and had provided concrete basis for obtaining *in camera* review of those records, and taking that fact together with fact that state was seeking sentence of death [which it concluded provided broader basis for determining whether respondent judge erred in finding defendant did not satisfy applicable disclosure test], court concluded defendant sustained her burden of establishing a reasonable possibility that the protected records contain critical information, thus showing she was entitled to *in camera* review of medical

and therapeutic records contained within DCS file that had not yet been disclosed so that respondent judge may determine whether they contained information to which defendant was entitled as matter of due process). **Rev. continued 2/02/2021.**

State v. Dunbar, 249 Ariz. 37, 465 P.3d 527, ¶¶ 23–29 (Ct. App. 2020) (defendant claimed trial court abused its discretion and denied him his due process rights when it denied his request for victim's medical records from Pennsylvania, Maryland, and Arizona, contending victim had mental health history that extended over 15 years and had been diagnosed with severe depression and bipolar disorder, had a family history of schizophrenia, and history of not taking her medication, being paranoid, and being delusional and dishonest, and further claimed personal knowledge that victim did not take her medication often and her mental conditions had her creating illusions, which may affect her testimony and identification; court held defendant did not provide sufficiently specific basis for requiring victim to produce her medical records and thus failed to establish a reasonable possibility that the protected records contain critical information because defendant's request was nothing more than conclusory assertion that victim's medical records could contain exculpatory information, noting that defendant did not explain how broad assertion that victim was "delusional" would support his misidentification defense, and more importantly, at trial defendant abandoned his proposed claim of misidentification, instead arguing self-defense, and offered no explanation how victim's medical records would be relevant to issue of whether his actions in shooting her were justified, and thus had no apparent relationship to defense actually presented). **Rev. denied 12/15/2020.**

R.S. v. Thompson (Vanders), 247 Ariz. 575, 454 P.3d 1010, ¶¶ 9–28 (Ct. App. 2019) (defendant was charged with second-degree murder; on his request, trial court ordered hospital to disclose deceased victim's privileged mental health records for *in camera* review; court held that, because defendant did not establish substantial probability that protected records contained information critical to element of charge or defense, or that their unavailability would result in fundamentally unfair trial, trial court erred by granting *in camera* review of victim's privileged records). **Rev. granted 8/25/2020.**

Rule 15.2(g) The defendant's disclosure—Disclosure by court order.

15.2.g.030 By its terms, this Rule does not provide the exclusive means for obtaining records and information in the possession or control of a third party.

State v. Smith, 250 Ariz. 69, 475 P.3d 558, ¶¶ 37–38 (2020) (court rejected defendant's contention that state should have used Rule 15.2(g)(1), rather than § 13–3016, to obtain his CSLI information).

RULE 16. PRETRIAL MOTIONS AND HEARINGS.

Rule 16.2(b) Procedure on pretrial motions to suppress evidence—Burden of proof on pretrial motions to suppress evidence.

16.2.b.010 If the state obtained the evidence either by (1) confession or (2) search and seizure, and either (1) Rule 15 allows the defendant to discover the circumstances of obtaining of the evidence, (2) defendant's attorney was present when the evidence was obtained, or (3) the state obtained the evidence pursuant to a search warrant, the defendant has the burden of going forward with specific facts showing the evidence should be suppressed.

State v. Gasbarri, 248 Ariz. 619, 463 P.3d 243, ¶¶ 8–18 (Ct. App. 2020) (on January 4, 2019, defendant filed motion to suppress all evidence obtained from allegedly unlawful seizure of cell phone found in his possession during investigation, and trial court set motion for hearing on February 5; state did not file response to motion within 10-day period provided by Rule 1.9(b), prompting defendant to file motion to preclude or strike any subsequent response from state; only then did state file motion seeking additional time to respond to motion to suppress, citing fact that "[p]rosecutor was in [a 2] week murder trial which concluded on Thursday, January 24"; trial court noted murder trial to which state referred "commenced on January 15—one day AFTER the State's response was due," but nevertheless extended state's response deadline to January 30; despite seeking and obtaining extension, state, without providing any explanation, again failed to respond to motion to suppress; trial court then deemed defendant's motion to suppress submitted on record; on February 5, trial court granted state's motion to continue suppression hearing until February 11, and offered parties opportunity to provide "concurrent briefing" on what "submitted on the record" meant; defendant filed brief in response to trial court's inquiry; state failed to do so; at February 11 suppression hearing, trial court noted state's failure to provide briefing, but gave both parties opportunity to argue their positions; trial court denied state's request to call witnesses and determined record before it was limited to defendant's motion to suppress; in granting defendant's motion, trial court concluded he had established cell phone was seized "without lawful authority" and had satisfied his burden of going forward under Rule 16.2(b), thus triggering state's burden of proving lawfulness of acquisition of cell phone; court held that, in situations such as present case, state's burden under Rule 16.2(b)(1) arises only after defendant alleges specific circumstances and establishes prima facie case supporting suppression of evidence at issue, and party who bears burden of going forward must produce sufficient preliminary evidence before party with burden of persuasion must proceed with its evidence; court further held that, because trial court never held evidentiary hearing and that neither side presented any evidence, trial court did not have any evidence upon which to rule and thus should not have granted defendant's motion to suppress; court therefore remanded to allow trial court to give parties opportunity to present evidence; court did note that state committed "acts and omissions . . . that, at the very least, evince incomprehensible inattention to a very significant case").

Rule 16.4(b) Dismissal of prosecution—On defendant's motion.

16.4.b.010 The trial court may dismiss the charges when the charging document is insufficient as a matter of law, which is when the document fails to inform the defendant of the essential elements of the charge or is not sufficiently definite to allow the defendant to meet the charges, but may not dismiss the charges merely because it believes that the state will be unable to prove the elements of the offense.

State v. Holmes, 250 Ariz. 311, 478 P.3d 1256, ¶¶ 5–23 (Ct. App. 2020) (defendant pled guilty to solicitation to commit 3rd degree burglary, which plea agreement described as "class 6 undesignated offense" and provided that undesignated offense "shall be treated as a felony for all purposes unless and until the Court enters an order designating the offense a misdemeanor"; trial court accepted guilty plea, but defendant failed to appear for sentencing on multiple occasions; 3 months later, defendant was charged with weapons misconduct (possession of deadly weapon by prohibited possessor) based on state's allegation that defendant had knowingly possessed firearm after he pled guilty to burglary charge; defendant filed

motion to dismiss indictment, arguing that, because he had been "denied his due process right to notice" that he was convicted felon and thus prohibited possessor, "his actions [did] not lawfully constitute criminal conduct" and indictment was insufficient as matter of law; court held defendant was "convicted" once he entered his guilty plea, and that violation of offense would occur if defendant knew he possessed firearm and there was no requirement he knew he was prohibited possessor, thus indictment was sufficient and trial court properly denied defendant's motion to dismiss).

ARTICLE V. PLEAS OF GUILTY AND NO CONTEST.

Rule 17. Pleas of guilty and no contest; Submitting a case on the record.

17.0.019 Courts may apply the invited error doctrine only if the party asserting the error is the source of the error, and although the party urging the error need not always be the initial party to propose it, the record must be clear that the party urging the error engaged in affirmative, independent action to create the error or argue in favor of it; in the context of a stipulated plea agreement, the invited error doctrine should apply only when the party took independent affirmative unequivocal action to initiate the error or actively defended the error and did not merely fail to object to the error or merely acquiesce in it, thus when both parties are involved in creating and agreeing to the terms, it must be clear from the record that the defendant not only agreed to the error but either initiated it or actively defended it.

State v. Robertson, 249 Ariz. 256, 468 P.3d 1217, ¶¶ 8–30 (2020) (defendant was charged with first-degree murder and intentional child abuse; defendant pled guilty to manslaughter and reckless child abuse pursuant to plea agreement that provided she would receive prison term for manslaughter and be placed on consecutive period of probation for child abuse, but that she could be sentenced to prison if she violated probation; after completing prison sentence and being placed on probation, defendant violated probation and was sentenced to prison; defendant for first time argued that both counts involved same victim, thus § 13–116 precluded second prison sentence; court held invited error did not apply and remanded matter for court of appeals to consider legality of defendant's sentence under § 13–116).

ARTICLE VI. TRIAL.

RULE 18. TRIAL BY JURY; WAIVER; SELECTION AND PREPARATION OF JURORS.

Rule 18.4(c) Challenges—Peremptory challenges.

18.4.c.130 For a *Batson* challenge, once a party has made out a *prima facie* case of purposeful discrimination, the burden shifts to the other party to show a nondiscriminatory explanation for the strike, which need not rise to the level justifying exercise of a challenge for cause.

State v. Smith, 250 Ariz. 69, 475 P.3d 558, ¶¶ 62–66 (2020) (prosecutor struck two jurors who were only African Americans on panel; court held trial court correctly concluded state offered race-neutral reasons for striking both jurors (reluctance to impose death penalty, and health problems and schedule conflicts)).

18.4.c.160 For a *Batson* challenge, once a party has made a *prima facie* case of purposeful discrimination and the other party has shown a nondiscriminatory explanation for the strike, the burden shifts back to the moving party to show the strike was for an improper reason; court will not reverse ruling of trial court unless reasons given are clearly pretextual.

State v. Smith, 250 Ariz. 69, 475 P.3d 558, ¶¶ 67–68 (2020) (prosecutor struck two jurors who were only African Americans on panel; court held trial court correctly concluded state offered race-neutral reasons for striking both jurors (reluctance to impose death penalty, and health problems and schedule conflicts); and held record supported trial court's conclusion reasons given were not pretextual).

18.4.c.200 The trial court is required to make explicit findings on (1) the demeanor-based explanation for the strikes and (2) the racially disproportionate impact of the strikes.

State v. Porter, 248 Ariz. 392, 460 P.3d 1276, ¶¶ 1–23 (Ct. App. 2020) (defendant (who is black) raised *Batson* challenge based on state's use of peremptory strikes against only two black individuals on prospective jury panel; trial court denied *Batson* challenge but did not make explicit findings (1) whether demeanor-based explanation for strikes was credible or (2) racially disproportionate impact of strikes; court remanded to permit trial court to make necessary findings or, if passage of time has rendered that impossible, to vacate defendant's conviction and retry case).

18.4.c.210 Because of the dynamics of jury selection and the usual lack of any discussion about those jurors who were not removed, it is difficult if not impossible for an appellate court to conduct a comparative analysis of the challenge of one prospective juror with the retention of another retained juror who appears on paper to be similar, so the appellate court will defer to the trial court's finding.

State v. Smith, 250 Ariz. 69, 475 P.3d 558, ¶¶ 71 (2020) (court noted that, although U.S.S.Ct. court case explained comparative analysis may be relevant in addressing *Batson* challenge, it did not require such analysis for first time on appeal).

RULE 19. TRIAL.

Rule 19.1(mmt) Conduct of trial—Motion for mistrial.

19.1.mmt.050 A defendant is entitled to a mistrial based on **juror misconduct** only if (1) a juror obtained information the juror was not permitted to obtain and (2) that juror was probably influenced by that information.

State v. Kleinman, 250 Ariz. 362, 480 P.3d 105, ¶¶ 12–13 (Ct. App. 2020) (when defendant was 20 years old, he was charged with three counts of sexual conduct with minor that he committed on his sister when he was 12 or 13 years old and she was 5 or 6 years old; defendant objected to portions of recording of interview of witness that referred to investigation of defendant about separate sexual misconduct charges; state agreed to excerpt those portions of tape, but tape was not properly excerpted, so jurors improperly heard four short references to that investigation; trial court struck improper evidence from record and instructed jurors that "any other reference to any other open cases against Mr. Kleinman is stricken from the record, and you must not consider that for any reason"; defendant contended trial court erred in denying his motion for mistrial; court held it was undisputed jurors should not have heard about separate investigation into defendant's other conduct, but those four improper references were brief and without context or detail, and trial court quickly struck them and instructed jurors to disregard them; moreover, given evidence presented at trial, there was no reasonable probability verdict would have been different had improper references not been played; thus trial court did not abuse discretion in denying motion for mistrial).

State v. Bolivar, 250 Ariz. 213, 477 P.3d 672, ¶¶ 18–35 (Ct. App. 2020) (after impaneling jurors, trial court admonished them not to do any independent research about case and emphasized need to evaluate case based solely upon what happened at trial; next morning, trial court learned two armed men had attacked victim's mother causing physical injuries; parties agreed to short continuance; trial court later revoked defendant's release; day before trial was scheduled to resume, defendant filed motions for change of venue and mistrial based on newspaper article published after jurors were impaneled, which reported trial court's finding defendant was responsible for attacks on victim's mother and showed photograph of defendant being handcuffed, and asked trial court to question jurors individually, which trial court denied; after trial resumed, trial court learned juror 5 had heard about article; trial court questioned juror 5, who said he saw the newspaper headline and defendant's picture, but said he had not communicated with any other juror and did not think article would influence him; trial court again denied defendant's request to question jurors individually, and all parties agreed juror 5 would be selected as alternate; court held defendant failed to show any of jurors who deliberated heard anything about newspaper article, thus trial court did not abuse discretion in denying motion for mistrial).

19.1.mmt.060 A defendant is entitled to a mistrial based on **juror** conduct or misconduct only if the defendant either shows actual prejudice or if prejudice may be fairly presumed from the facts.

State v. Macias, 249 Ariz. 335, 469 P.3d 472, ¶¶ 9–15 (Ct. App. 2020) (defendant contended he was deprived of impartial jury because some jurors committed misconduct by deliberating prematurely; court held that, because neither affidavit defendant presented showed jurors came to their verdict based on anything other than trial evidence, defendant failed to establish colorable claim for relief).

19.1.mmt.090 Prosecutorial misconduct is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but is when the prosecutor's actions, taken as a whole, amount to intentional conduct the prosecutor knows to be improper and prejudicial and pursues for any improper purpose with indifference to a significant danger of mistrial or reversal.

State v. Arias, 248 Ariz. 546, 462 P.3d 1051, ¶¶ 29–73 (Ct. App. 2020) (court discussed nine allegations of prosecutorial misconduct and concluded prosecutor engaged in improper and unethical conduct; court nonetheless concluded defendant was not entitled to new trial because there was no reasonable likelihood misconduct affected the jurors' verdict in light of overwhelming evidence of defendant's guilt, as reflected through her own admissions and as clearly set forth within record, which would not have permitted any reasonable juror to acquit her of charged offense).

19.1.mmt.100 When reviewing the conduct of prosecutors in the context of "prosecutorial misconduct" claims, courts should differentiate between "error," which may not necessarily imply a concurrent ethical rules violation, and "misconduct," which may suggest an ethical violation; for purposes of evaluating the merits of a "prosecutorial misconduct" claim, any finding of error or misconduct may entitle a defendant to relief, but courts should not conflate that inquiry with the collateral issue of a prosecutor's ethical culpability.

In re Martinez, 248 Ariz. 458, 462 P.3d 36, ¶¶ 42–47 (2020) (court stated case presented opportunity to provide guidance to courts by clarifying difference between prosecutorial misconduct that may necessitate a new trial and prosecutor's conduct that violates ethical rules).

19.1.mmt.120 To determine whether the **prosecutor's** remarks or actions were so objectionable as to require a mistrial, the trial court must consider (1) whether the remarks or actions call to the attention of the jurors matters that they would not be justified in considering, and (2) the probability that the jurors, under the circumstances of the case, were influenced; further, the defendant must show the offending statements were so pronounced and persistent that they permeated the entire atmosphere of the trial and so infected the trial with unfairness that they made the resulting conviction a denial of due process.

State v. Allen, 248 Ariz. 352, 460 P.3d 1236, ¶¶ 48–50 (2020) (court said prosecutor skirted line and arguably crossed it by asking jurors to tell defendant that his life was not more valuable than victim's life, but held there was no reasonable likelihood that statement affected verdict in light fleeting nature of comment and proper instructions from trial court).

State v. Lapan, 249 Ariz. 540, 472 P.3d 1103, ¶¶ 25–29 (Ct. App. 2020) (defendant contended prosecutor's question to jurors suggested that only gullible person or "sucker" would believe defendant's case; court described prosecutor's question as "perhaps inartful" or even gratuitously coarse, but held that asking prospective jurors if they were gullible or if someone close to them would describe them as "sucker" was not misconduct).

State v. Morgan, 248 Ariz. 322, 460 P.3d 314, ¶¶ 4–5 (Ct. App. 2020) (in closing, prosecutor argued charged offenses were not "everything [Morgan] did" to victim. Defendant contended prosecutor's comment constituted improper vouching to jurors that he had committed other illegal acts in addition to ones charged; court noted prosecutor's remarks referred to properly admitted evidence of "other crimes, wrongs, or acts" that were "relevant to show that [Morgan] had a character trait giving rise to an aberrant sexual propensity to commit the offense charged" under Rule 404(c), thus no error).

19.1.mmt.170 The prosecutor may comment on the failure of the defendant to produce evidence as long as that does not highlight the defendant's failure to testify, such as when the defendant is the only one who could have produced the evidence.

State v. Riley, 248 Ariz. 154, 459 P.3d 66, ¶¶ 53–54 (2020) (court noted prosecutor merely commented on defendant's failure to present witnesses to support theory of his defense).

19.1.mmt.260 The cumulative error doctrine does apply to claims of prosecutorial misconduct because, even if the several actions are not errors in and of themselves, they may show that the prosecutor intentionally engaged in improper conduct and did so either with indifference or with the specific intent to prejudice the defendant.

State v. Arias, 248 Ariz. 546, 462 P.3d 1051, ¶¶ 71–77 (Ct. App. 2020) (court stated that, "while we conclude that this is an egregious case of misconduct by a highly-experienced prosecutor, and we strongly disapprove of his actions, we are compelled to follow the well-established principle that we do not 'reverse convictions merely to punish a prosecutor's misdeeds [ ] or to deter future misconduct'").

19.1.mmt.270 When a defendant raises a claim on appeal that multiple incidents of prosecutorial misconduct (for which defendant failed to object) cumulatively deprived defendant of a fair trial, the defendant must: (1) assert cumulative error exists; (2) cite to the record where the alleged instances of misconduct occurred; (3) cite to legal authority establishing that the alleged instances constitute prosecutorial misconduct; and (4) set forth the reasons why the cumulative misconduct denied the defendant a fair trial with citation to applicable legal authority; the

defendant is not required to argue that each instance of alleged misconduct individually deprived him of a fair trial and need not argue that the trial court committed fundamental error by failing *sua sponte* to grant a new trial in each instance.

State v. Vargas, 249 Ariz. 186, 468 P.3d 739, ¶¶ 8–15 (2020) (although he never objected at trial, on appeal he alleged 11 different instances of purported misconduct, some involving multiple acts; for eight alleged incidents of misconduct, court of appeals concluded that, because defendant failed to set forth argument of fundamental error for each allegation, he waived argument that error occurred, and ultimately concluded defendant failed to successfully argue misconduct for any of his allegations; court remanded to court of appeals to determine (1) whether defendant has carried his burden of persuasion to establish that misconduct did occur for each allegation and (2) whether cumulatively they denied him fair trial).

RULE 21. INSTRUCTIONS.

Rule 21.1 Applicable law.

21.1.043 A trial court may instruct the jurors under circumstances to minimize the risk that the jurors will base their verdict on an erroneous legal assumption.

State v. Riley, 248 Ariz. 154, 459 P.3d 66, ¶¶ 79–84 (2020) (defendant contended trial court erred by instructing jurors that duress is not defense to first degree murder; although neither party relied on duress theory, trial court did not err in giving duress instruction because, without it, jurors could have improperly concluded defendant killed victim to avoid physical harm by members of Aryan Brotherhood).

RAJI S.C. 9 Flight.

9.sc.010 In order to give a flight instruction, the evidence must show the defendant left the scene in a manner that invites suspicion or announces guilt, either because (1) the flight or attempted flight was open, such as the result of an immediate pursuit, or (2) the defendant utilized the element of concealment or attempted concealment; in order to give a concealment instruction, the evidence must show either (1) the defendant concealed or attempted to conceal himself or herself, or (2) the defendant concealed or attempted to conceal evidence.

State v. Dunbar, 249 Ariz. 37, 465 P.3d 527, ¶¶ 30–31 (Ct. App. 2020) (defendant testified he left scene because he "got nervous" after he saw ambulance coming for victim; court noted defendant, after leaving, disposed of firearm he had used, drove to Alabama (state outside scope of his rental agreement) to return car he was driving, and then traveled to New York and remained there until he was tracked down and apprehended almost 3 months later; court held these facts suggested attempt to avoid arrest or detention and were sufficient to warrant flight instruction).

Willits instruction.

21.1.815 To be entitled to a *Willits* instruction, the "defendant must show that (1) the state failed to preserve obviously material and reasonably accessible evidence that could have had a tendency to exonerate the accused, and (2) there was resulting prejudice; this two-element test requires four inherent predicate showings: (1) that evidence existed; (2) which was destroyed (or not preserved) by the state; (3) which could have had a "tendency to exonerate" the defendant by being "potentially useful to a defense theory supported by the evidence"; and (4) prejudice.

State v. Hernandez, 250 Ariz. 28, 474 P.3d 1191, ¶¶ 9–25 (2020) (officer saw car run a stop sign, causing him to swerve to avoid collision; officer "locked eyes" with driver for 1 or 2 seconds; officer later testified driver's face was "a face that [he] would never forget"; officer attempted traffic stop, but car did not stop, which resulted in pursuit that eventually ended when driver and two other occupants fled on foot; officer saw driver's profile as he fled; defendant was arrested 3 months later; defendant claimed he was not driver of vehicle and that he was entitled to *Willits* instruction based on state's failure to collect fingerprints and DNA evidence from car; court noted that, at outset of state's investigation, officer had already identified defendant, so officers had no need to collect fingerprint or DNA evidence to identify suspect, and at that time, officers had no knowledge defendant would later assert existence of alternate driver that would make DNA or fingerprint evidence material, and thus held defendant failed to show DNA or fingerprint evidence was "obviously material," and further held defendant failed to show uncollected evidence tended to exonerate him because any fingerprint or DNA evidence would only either: (1) match him, definitively confirming he was driver; or (2) not match defendant, which would not conclusively exculpate him because he may not have left identifiable DNA or fingerprints, even if he were driver; court thus held trial court did not abuse discretion in refusing defendant's requested *Willits* instruction).

State v. Togar, 248 Ariz. 567, 462 P.3d 1072, ¶¶ 25–29 (Ct. App. 2020) (97-year-old victim was in senior-living facility where someone was stealing money from him; as result, victim's daughter and son-in-law marked four $20 bills, photographed them, recorded serial numbers, and put them in victim's wallet, and installed a motion-sensor camera in victim's room; next day, camera recorded person in victim's room; search revealed three $20 bills were missing, and video showed defendant in victim's room; officer searched defendant and found three marked $20 bills; defendant contended he was entitled to *Willits* instruction because officer preserved only potion of video showing defendant entering and staying in room, and did not keep potion of video before defendant entered room, which would have contained sound defendant claimed he heard and that caused him to enter room; court held defendant's claim involved only speculation, and even if video did contain sound that caused him to enter room, jurors could have concluded defendant formed requisite intent after he entered room, thus trial court properly denied *Willits* instruction).

21.1.820 To be entitled to a *Willits* instruction, the defendant must show that the state failed to preserve obviously material evidence, and evidence is "obviously material" when, at the time the state encounters the evidence during its investigation, the state relies on the evidence or knows the defendant will use the evidence for his or her defense.

State v. Hernandez, 250 Ariz. 28, 474 P.3d 1191, ¶¶ 9–25 (2020) (officer saw car run a stop sign and attempted traffic stop; pursuit eventually ended in parking lot, where driver and two other occupants fled on foot; defendant was arrested 3 months later; defendant claimed he was not driver of vehicle and that he was entitled to *Willits* instruction based on state's failure to collect fingerprints and DNA evidence from car; court noted that, at outset of state's investigation, officer had already identified defendant, so officers had no need to collect fingerprint or DNA evidence to identify suspect, and at that time, officers had no knowledge defendant would later assert existence of alternate driver that would make DNA or fingerprint evidence material,; court and thus held defendant failed to show DNA or fingerprint evidence was "obviously material," and that trial court did not abuse discretion in refusing defendant's requested *Willits* instruction).

RULE 22. DELIBERATIONS.

Rule 22.4 Assisting jurors at impasse.

22.4.020 The test to determine whether the trial court has coerced the jurors into reaching a verdict is whether the trial court's actions, viewed in the totality of the circumstances, displaced the independent judgment of the jurors.

State v. Smith, 250 Ariz. 69, 475 P.3d 558, ¶¶ 147–56 (2020) (jurors deliberated 2½ hours before advising bailiff they were unable to come to agreement; trial court held further discussions with jurors and read them standard impasse instruction; jurors deliberated another 49 minutes and returned death sentence; defendant contended trial court coerced death verdict; court noted trial court did not know numerical split among jurors, jurors deliberated for only 2½ half hours before reaching impasse, trial court reiterated several times it was not trying to displace jurors' judgment, explained jurors had "however long that you feel that you need to deliberate," "there are no time limits," they should take "whatever [they] think is appropriate," and it was "fine" if they thought time already spent was sufficient; court noted standard impasse instruction also stated it was not attempt to "force a verdict," and concluded that, under totality of circumstances, trial court did not coerce jurors).

ARTICLE VII. POST-VERDICT PROCEEDINGS.

RULE 24. POST-TRIAL MOTIONS.

Rule 24.1(c)(3)(A) Motion for new trial—Grounds—Juror misconduct—Receiving evidence not admitted at trial.

24.1.c.3.a.020 If the trial court determines a juror did not considered extrinsic information or that the extrinsic information did not affect the juror's determination or the ultimate verdict, the defendant is not entitled to a new trial.

State v. Bolivar, 250 Ariz. 213, 477 P.3d 672, ¶¶ 18–36 (Ct. App. 2020) (after impaneling jurors, trial court admonished them not to do any independent research about case and emphasized need to evaluate case based solely upon what happened at trial; next morning, trial court learned two armed men had attacked victim's mother causing physical injuries; parties agreed to short continuance; trial court later revoked defendant's release; newspaper published article that reported trial court's finding defendant was responsible for attacks on victim's mother and showed photograph of defendant being handcuffed; defendant asked trial court to question jurors individually, which trial court denied; after trial resumed, trial court learned juror 5 had heard about article; trial court questioned juror 5, who said he saw the newspaper headline and defendant's picture, but said he had not communicated with any other juror and did not think article would influence him; trial court again denied defendant's request to question jurors individually, and all parties agreed juror 5 would be selected as alternate; after verdict, defendant asked for new trial; court held defendant failed to show any of jurors who deliberated heard anything about newspaper article, thus trial court did not abuse discretion in denying motion for new trial).

Rule 24.2(b) Motion to vacate judgment—Time for filing.

24.2.b.020 The time runs from the entry of judgment ***and*** sentence, thus a trial court has no jurisdiction to rule on a motion to vacate judgment until it has entered a judgment and imposed a sentence.

State ex rel. Adel v. Hannah (Buckman), 249 Ariz. 537, 472 P.3d 1100, ¶¶ 9–19 (Ct. App. 2020) (defendant was found guilty of first-degree murder; during aggravation/eligibility phase, jurors found defendant's conduct satisfied *Enmund/Tison*; case proceeded to penalty phase, but trial court declared mistrial after jurors could not unanimously reach verdict for defendant's sentence; while defendant's case was pending retrial of penalty phase, trial court granted defendant's motion to vacate jurors' *Enmund/Tison* verdict; court held that, because trial court had not yet entered judgment and imposed sentence, trial court did not have jurisdiction to rule on defendant's motion to vacate).

ARTICLE VII. POST-VERDICT PROCEEDINGS.

RULE 26. JUDGMENT, PRE-SENTENCE REPORT, PRE-SENTENCE HEARING, SENTENCE.

Rule 26.1(a) Definitions; scope—Determination of guilt.

26.1.a.010 In the popular sense of the term, "conviction" means that the defendant has been found guilty or has pled guilty; in order for there to be a "conviction," it is not necessary for the court to enter a judgment or impose sentence.

State v. Holmes, 250 Ariz. 311, 478 P.3d 1256, ¶ 9 (Ct. App. 2020) (defendant pled guilty to solicitation to commit 3rd degree burglary, which plea agreement described as "class 6 undesignated offense" and provided that undesignated offense "shall be treated as a felony for all purposes unless and until the Court enters an order designating the offense a misdemeanor"; trial court accepted guilty plea, but defendant failed to appear for sentencing on multiple occasions; 3 months later, defendant was charged with weapons misconduct (possession of deadly weapon by prohibited possessor) based on state's allegation that defendant had knowingly possessed firearm after he pled guilty to burglary charge; defendant filed motion to dismiss indictment, arguing that, because he had been "denied his due process right to notice" that he was convicted felon and thus prohibited possessor, "his actions [did] not lawfully constitute criminal conduct" and indictment was insufficient as matter of law; court held defendant was "convicted" once he entered his guilty plea, and that violation of offense would occur if defendant knew he possessed firearm and there was no requirement he knew he was prohibited possessor, thus indictment was sufficient and trial court properly denied defendant's motion to dismiss).

RULE 27. PROBATION AND PROBATION REVOCATION.

Rule 27.7(c) Initial appearance after arrest—Procedure.

27.7.c.010 As a result of the January 1, 2018, amendments, this section no longer requires the court to apply Rule 7.2(c) when it determines whether to release a probationer arrested pursuant to a petition to revoke probation.

Wilson v. Higgins, 249 Ariz. 344, 469 P.3d 481, ¶¶ 11–18 (Ct. App. 2020) (court held trial court erred when it ordered defendant "shall be held without bail pursuant to Rule 7.2(c)," and remanded for trial court to redetermine release conditions).

Rule 27.8(b)(3) Probation revocation—Violation hearing—Conduct of the hearing; Evidence.

27.8.b.3.230 The trial court may receive any reliable evidence not privileged, including hearsay, and in the absence of any positive evidence that controverts the reliability of a urinalysis report, such reports have consistently been found to be reliable.

State v. Brown, 250 Ariz. 121, 475 P.3d 1161, ¶¶ 5–12 (Ct. App. 2020) (defendant contended trial court abused its discretion in admitting his urinalysis results, specifically that there were several violations of Arizona Code of Judicial Administration (ACJA) that made test results unreliable; court held ACJA does not determine admissibility of probationer drug tests and does not supersede trial court's discretion and authority for admissibility of evidence in revocation hearings, and further held state presented sufficiently reliable evidence, thus trial court did not abuse its discretion in admitting urinalysis evidence).

ARTICLE VIII. APPEAL AND OTHER POST-CONVICTION RELIEF.

RULE 31. APPEAL FROM SUPERIOR COURT.

Rule 31.8(e) The record on appeal—Narrative statement if no record is available.

31.8.e.010 The trial court is required to take all reasonable measures to ensure that the record provides a complete account of the defendant's trial sufficient to afford defendant a meaningful right of appeal.

State v. Sahagun-Llamas, 248 Ariz. 120, 458 P.3d 875, ¶¶ 11–20 (Ct. App. 2020) (trial court held trial lasting 7 days; after defendant testified, he absconded and was subsequently arrested 13 years later; upon review, it was discovered court reporter had not transcribed 4th day of trial (when two of defendant's witnesses testified); neither trial court nor attorneys could recall what testimony was that day; court concluded trial court's efforts to reconstruct record were not sufficient for meaningful appeal, and so ordered new trial).

RULE 32. POST-CONVICTION RELIEF FOR DEFENDANTS SENTENCED FOLLOWING A TRIAL OR A CONTESTED PROBATION VIOLATION HEARING.

Rule 32.1(g) Scope of remedy—Grounds for Relief—Significant change in the law.

32.1.g.010 A "significant change in the law" will occur when an appellate court overrules previously binding case law or when a statutory or constitutional amendment makes a definite break from prior case law, but does not occur when a case merely interprets a statutory or constitutional provision already in effect.

State v. Soto-Fong, 250 Ariz. 1, 474 P.3d 34, ¶ 50 (2020) (court held *Graham, Miller,* and *Montgomery* did not prohibit consecutive sentences imposed for separate crimes when aggregate sentences exceed juvenile's life expectancy, thus *Graham* and its progeny do not represent significant change in law under Rule 32.1(g)).

State v. Bigger, 250 Ariz. 174, 476 P.3d 722, ¶¶ 31–38 (Ct. App. 2020) (on question of pretrial identification, court held *Perry v. New Hampshire* was not significant change in law, and that *State v. Nottingham* imposed new requirement and thus was new rule, but it was procedural and should not be retroactively applied to defendant's case).

Rule 32.2(b)(3) Preclusion of remedy—Claims not precluded—Waived.

32.2.b.3.010 When a defendant raises a claim under Rule 32.l(b) through (h) in a successive or untimely post-conviction notice, the defendant must explain the reasons for not raising the claim in a previous notice or petition, or for not raising the claim in a timely manner, and if the notice does not provide **sufficient** reasons why the defendant did not raise the claim in a previous notice or petition, or in a timely manner, the court may summarily dismiss the notice.

State v. Leeman, 250 Ariz. 251, 478 P.3d 246, ¶¶ 3–18 (Ct. App. 2020) (defendant's conviction was affirmed on appeal in 1996; defendant filed her sixth petition for post-conviction relief contending "previous lawyers" were "clearly ineffective" for failing to raise certain sentencing issues; court rejected defendant's "apparent assertion that *any* reason constitutes a *sufficient* reason for an untimely filing [because that] would render the addition of that word to the rule meaningless," concluding that supreme court "intended that the trial court act as the gatekeeper to determine if the reason provided to avoid a finding of untimeliness is sufficient," and holding trial court did not abuse discretion in summarily dismissing defendant's petition).

Rule 32.4(b)(3)(A) Filing a Notice Requesting Post-Conviction Relief—Notice Requesting Post-Conviction Relief—Time for Filing—Claims under Rule 32.1(a).

32.4.b.3.A.010 A defendant must file the notice for a claim under Rule 32.1(a) within 90 days after the oral pronouncement of sentence or within 30 days after the issuance of the mandate in the direct appeal, whichever is later.

State v. Bigger, 250 Ariz. 174, 476 P.3d 722, ¶¶ 2–7 (Ct. App. 2020) (court issued its mandate 3/30/2012; on 5/02/2012 defendant filed motion for extension of time, which trial court granted; defendant filed his notice 5/21/2012; defendant's motion for extension of time to file his notice was thus filed after time for notice had passed).

Rule 32.4(b)(3)(D) Filing a Notice Requesting Post-Conviction Relief—Notice Requesting Post-Conviction Relief—Time for Filing—Excusing an Untimely Notice.

32.4.b.3.D.010 The court must excuse an untimely notice requesting post-conviction relief filed under subpart (3)(A) if the defendant adequately explains why the failure to timely file a notice was not the defendant's fault.

State v. Bigger, 250 Ariz. 174, 476 P.3d 722, ¶¶ 2–7 (Ct. App. 2020) (court issued its mandate 3/30/2012; on 5/02/2012 defendant filed motion for extension of time, which trial court granted; defendant filed his notice 5/21/2012; defendant's motion for extension of time to file his notice was thus filed after time for notice had passed; court noted defendant was represented and clearly relied on counsel, thus counsel and not defendant was at fault for late filing of motion for extension, and held trial court was required to excuse untimely notice).

State v. Bigger, 250 Ariz. 174, 476 P.3d 722, ¶¶ 8–19 (Ct. App. 2020) (court stated question was whether §§ 13–4232 and 13–4234, which do not include exemption from statutory time limits for constitutional claims, conflict with new provisions of Rules 32 and 33, which provide that defendant may be excused from filing timely notice when he or she is not at fault for late filing of notice raising such claims; court then harmonized those provisions).

RULE 33. POST-CONVICTION RELIEF FOR DEFENDANTS WHO PLED GUILTY OR NO CONTEST, WHO ADMITTED A PROBATION VIOLATION, OR WHO HAD AN AUTOMATIC PROBATION VIOLATION.

Rule 33.1(2)(a) Scope of remedy—Grounds for Relief—Constitutional violation.

33.1.2.a.010 Under Rules 33.1(a) and 33.4(b)(3)(A), a defendant must file a notice of post-conviction relief within 90 days of the sentence to assert a claim that the plea was obtained in violation of the United States or Arizona constitutions.

State v. Botello-Rangel, 248 Ariz. 429, 461 P.3d 449, ¶¶ 5–8 (Ct. App. 2020) (in 2009, defendant pled guilty and in June 2018 file petition for post-conviction relief claiming ineffective assistance of counsel and involuntary guilty plea; because defendant filed this petition more than 90 days after sentencing, it was untimely).

Rule 33.1(e) Scope of remedy—Grounds for Relief—Newly-discovered evidence.

33.1.e.210 For a colorable claim of newly-discovered evidence to exist, the defendant must show the defendant was diligent in discovering the facts and bringing them to the trial court's attention.

State v. Botello-Rangel, 248 Ariz. 429, 461 P.3d 449, ¶¶ 13–17 (Ct. App. 2020) (in 2009, defendant pled guilty and in June 2018 file petition for post-conviction relief claiming ineffective assistance of counsel and involuntary guilty plea because he was not told his guilty plea would affect his immigration status; defendant contended his petition was timely because, although he received removal notice December 2013, immigration court did not rule until March 2018; court held defendant should have been aware of potential for removal in 2013, thus defendant was not diligent in not filing until 2018).

Rule 33.4(b)(3)(A) Filing a Notice Requesting Post-Conviction Relief—Notice Requesting Post-Conviction Relief—Time for Filing—Claims Under Rule 33.1(a).

33.4.b.3.A.010 Under Rules 33.1(a) and 33.4(b)(3)(A), a defendant must file a notice of post-conviction relief within 90 days of the sentence to assert a claim that the plea was obtained in violation of the United States or Arizona constitutions.

State v. Botello-Rangel, 248 Ariz. 429, 461 P.3d 449, ¶¶ 5–8 (Ct. App. 2020) (in 2009, defendant pled guilty and in June 2018 file petition for post-conviction relief claiming ineffective assistance of counsel and involuntary guilty plea; because defendant filed this petition more than 90 days after sentencing, it was untimely).

Rule 33.4(b)(3)(B) Filing a Notice Requesting Post-Conviction Relief—Notice Requesting Post-Conviction Relief—Time for Filing—Claims Under Rule 33.1(b) through (h).

33.4.b.3.B.010 A claim of ineffective assistance of counsel is not cognizable as a non-precluded claim under Rules 33.1(b) through (h) because it is recognized under Rule 33.1(a).

State v. Botello-Rangel, 248 Ariz. 429, 461 P.3d 449, ¶¶ 9–11 (Ct. App. 2020) (in 2009, defendant pled guilty and in June 2018 file petition for post-conviction relief claiming ineffective assistance of counsel and involuntary guilty plea; because defendant filed this petition

more than 90 days after sentencing, it was untimely under Rule 33.4(b)(3)(A); court further held claim was not cognizable under Rules 33.1(b) through (h)).

33.4.b.3.B.020 A claim that the plea was involuntary is not cognizable as a non-precluded claim under Rules 33.1(b) through (h) because it is recognized under Rule 33.1(a).

State v. Botello-Rangel, 248 Ariz. 429, 461 P.3d 449, ¶¶ 12 (Ct. App. 2020) (in 2009, defendant pled guilty and in June 2018 file petition for post-conviction relief claiming ineffective assistance of counsel and involuntary guilty plea; because defendant filed this petition more than 90 days after sentencing, it was untimely under Rule 33.4(b)(3)(A); court further held claim was not cognizable under Rules 33.1(b) through (h)).

Rule 33.4(b)(3)(C) Filing a Notice Requesting Post-Conviction Relief—Notice Requesting Post-Conviction Relief—Time for Filing—Successive Notices for Claims of Ineffective Assistance of Rule 33 Counsel.

33.4.b.3.C.010 Claims of ineffective assistance of Rule 33 counsel in a defendant's first proceeding for post-conviction relief must be asserted in a timely, successive proceeding.

State v. Mendoza, 249 Ariz. 180, 467 P.3d 1120, ¶¶ 5–15 (Ct. App. 2020) (defendant pled guilty; defendant initiated post-conviction relief proceedings, and appointed counsel filed notice that she could find no colorable claims; defendant filed *pro se* amendment claiming PCR counsel was ineffective; trial court denied that petition; defendant filed second petition for post-conviction relief, again claiming PCR counsel was ineffective, and also filed petition for review of trial court's denial of first petition for post-conviction relief; court held trial court should not have addressed in first petition for post-conviction relief claim that PCR counsel was ineffective and that such claim was proper in second petition for post-conviction relief, but because defendant had filed petition for review of ruling in first petition for post-conviction relief, second petition for post-conviction relief was nullity, and that defendant could file another petition for post-conviction relief once court had ruled on petition for review, and defendant could raise claim of ineffective assistance of counsel in that petition).

ARTICLE X. ADDITIONAL RULES.

RULES OF THE ARIZONA SUPREME COURT.

RULES OF PROFESSIONAL CONDUCT.

Rule 41(g) Duties and Obligations of Members—To avoid engaging in unprofessional conduct.

41.g.010 A member has the duty (1) to avoid engaging in unprofessional conduct and (2) to advance no fact prejudicial to the honor or reputation of a party or a witness unless required by the duties to a client or the tribunal; these obligations are in the disjunctive.

In re Martinez, 248 Ariz. 458, 462 P.3d 36, ¶¶ 20–28 (2020) (court concluded Martinez's conduct "fell far short of a model of professionalism, but in context, his conduct did not violate Rule 41(g)).

Rule 42, ER 4.4(a) Respect for Rights of Others—Rights of another person.

4.04.a.010 A lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden any other person, or use methods of obtaining evidence that violate the rights of such a person.

In re Martinez, 248 Ariz. 458, 462 P.3d 36, ¶¶ 29–32 (2020) (court concluded that, although Martinez's reasoning was legally flawed, it agree with the panel's conclusion that Bar provided insufficient evidence that Martinez's purpose was to embarrass, delay, or burden other parties rather than to counter defendant's perceived deception of jurors, and therefore concluded Bar failed to prove an ER 4.4(a) violation by clear and convincing evidence).

Rule 42, ER 8.4(d) Misconduct—Conduct prejudicial to the administration of justice.

8.04.d.010 A lawyer shall not engage in conduct that is prejudicial to the administration of justice, and a lawyer may violate this rule without committing any other ethical violation.

In re Martinez, 248 Ariz. 458, 462 P.3d 36, ¶¶ 33–35 (2020) (court concluded panel erred as matter of law by concluding ER 8.4(d) required violation of another ethical rule unless violation was so egregious and flagrantly violative of accepted professional norms that it undermines legitimacy of judicial process, and erred by concluding ER 8.4(d) applied exclusively to egregious and flagrant non-litigation conduct).

8.04.d.020 A lawyer may not make arguments that appeal to the fears or passions of the jurors.

In re Martinez, 248 Ariz. 458, 462 P.3d 36, ¶¶ 36–37 (2020) (court noted Martinez should have been aware of Comer's prohibition on improper emotional appeals to jurors when he tried Morris in 2005 (for which he was chastised); yet when trying Gallardo in 2009, in closing argument, he appealed to jurors' emotions, and persisted with line of argument despite the trial court repeatedly sustaining defense counsel's objections; and disregarded prohibition again in 2012 when trying Lynch II by asking jurors to put themselves in victim's place; and held this conduct violated E.R. 8.4(d) and imposed sanction of reprimand).

Rule 122(e). Use of Recording Devices in a Courtroom—Manner of coverage.

122.e.010 Any criminal case that generates a great deal of publicity presents some risks that the publicity may compromise the right of the defendant to a fair trial; for this reason, trial courts must be especially vigilant to guard against any impairment of the defendant's right to a verdict based solely upon the evidence and the relevant law.

State v. Arias, 248 Ariz. 546, 462 P.3d 1051, ¶¶ 11–23 (Ct. App. 2020) (defendant contended trial court improperly permitted media access to courtroom during trial, including live stream broadcast of proceedings, and asserted this media coverage deprived her of fair trial and impartial jury; court held trial court followed Rule 122, and that defendant failed to show proceedings were such that court could presume prejudice).

122.e.020 when a defendant demonstrates that trial publicity was so extensive or outrageous that it permeated the proceedings or created a 'carnival-like atmosphere," court presumes prejudice without a particularized examination of the publicity's effect on the jurors.

State v. Arias, 248 Ariz. 546, 462 P.3d 1051, ¶¶ 18–22 (Ct. App. 2020) (defendant contended trial court improperly permitted media access to courtroom during trial, and asserted this media coverage deprived her of fair trial and impartial jury; court stated that trial publicity was extensive, but nothing in record reflected proceedings were reduced to "mockery of justice").

122.e.030 Absent presumed prejudice, a defendant may show actual prejudice by establishing that the empaneled jurors were influenced by the publicity surrounding the case.

State v. Arias, 248 Ariz. 546, 462 P.3d 1051, ¶¶ 24–28 (Ct. App. 2020) (court stated defendant had not cited, and its review of the record has not revealed, any evidence to suggest that empaneled jurors were actually prejudiced by media coverage).

12–116.09 Assessment for victims' rights enforcement fund.

.020 Assuming the assessment for the victims' rights enforcement fund is not procedural in nature and thus is punishment, applying it to those who committed their crimes before the effective date of the statute would violate the prohibition against ex post facto laws.

State v. Raffaele, 249 Ariz. 474, 471 P.3d 685, ¶¶ 27–28 (Ct. App. 2020) (defendant committed offense August 2013, and assessment was effective January 1, 2015; court vacated $2 assessment trial court imposed).

13–105(12) Definitions. (Dangerous instrument.)

.010 A "dangerous instrument" is anything that, under the circumstances that it is used, attempted to be used, or threatened to be used, is readily capable of causing death or serious physical injury.

State v. Jones, 248 Ariz. 499, 462 P.3d 576, ¶¶ 6–9 (Ct. App. 2020) (defendant's four dogs bit and latched onto victim's legs; defendant was convicted of aggravated assault with dangerous instrument (a dog); defendant contended he was wrongfully convicted of aggravated assault with dangerous instrument because "the definition of dangerous instrument refers only to inanimate objects," thus excluding dogs; court relied on *State v. Fish* for its conclusion that a dog may be a dangerous instrument).

.020 Because a "dangerous instrument" is defined as anything that, under the circumstances that it is used, attempted to be used, or threatened to be used, is readily capable of causing death or serious physical injury, this section is not unconstitutionally vague.

State v. Francisco, 249 Ariz. 101, 466 P.3d 878, ¶¶ 8–13 (Ct. App. 2020) (defendant was convicted of aggravated assault by using 18-inch miniature souvenir baseball bat weighing just under ½ pound; defendant contended statute was unconstitutionally vague; because definition included "under the circumstances that it is used," court rejected defendant's argument that definition of "dangerous instrument" had potential to sweep in "most household items," and further noted jurors not only were required to consider how defendant used bat, they also were required to determine whether he acted "[i]ntentionally, knowingly or recklessly" in causing "physical injury" to victim).

13–105(30) Definitions. (Person.)

.010 "Person" means a human being.

State v. Stuebe, 249 Ariz. 127, 467 P.3d 252, ¶¶ 1, 9–12 (Ct. App. 2020) (triggered by motion detector, security camera recorded burglary in progress and sent email and video recording to security company; defendant contended email and video were hearsay; court held automated email and machine producing video were not "person," thus email and video recording attached to email were not hearsay because they were not made by person).

13–106(A) Death of convicted defendant; dismissal of appellate and post-conviction proceedings—Effect on pending appeal.

.010 Subsection (A), which provides that, on a convicted defendant's death, the court shall dismiss any pending appeal, is procedural law and is not supported by the Victim's Bill of Rights, and is therefore unconstitutional.

State v. Reed, 248 Ariz. 72, 456 P.3d 453, ¶¶ 2, 19, 31–33 (2020) (court of appeals had previously affirmed defendant's conviction on appeal; state filed motion requesting restitution, which trial court ordered; defendant appealed restitution order, but died while appeal was pending; court stated that, for pending appeal of restitution order upon convicted defendant's death: (1) A court should only decide issues that (a) are of statewide interest, (b) remain controversy, or (c) are capable of repetition so that court guidance would assist parties and courts in future cases; (2) court may permit deceased defendant's estate or other interested party to intervene in appeal; and (3) a court must dismiss appeal if (a) defendant dies before matter has been briefed, (b) defendant's counsel does not submit briefing, and (c) neither defendant's estate nor an interested party moves to intervene in appeal; court left for another day determination of procedure to be followed when defendant dies pending appeal of conviction or sentence).

.020 Subsection (A), which provides that, on a convicted defendant's death, the court shall dismiss any pending post-conviction proceeding, is procedural law, but is consistent with the procedure followed by the courts, and is therefore constitutional.

State v. Reed, 248 Ariz. 72, 456 P.3d 453, ¶ 19 (2020) (court of appeals had previously affirmed defendant's conviction on appeal; state filed motion requesting restitution, which trial court ordered; defendant appealed restitution order, but died while appeal was pending; because this matter did not involve post-conviction proceeding, court's statement was not essential to resolution of case).

13–106(B) Death of convicted defendant; dismissal of appellate and post-conviction proceedings—Effect on conviction, sentence, and restitution.

.010 Subsection (B), which provides that a convicted defendant's death does not abate the defendant's criminal conviction, sentence of imprisonment, restitution, fine, or assessment imposed by the sentencing court, is substantive law that is within the legislature's authority to enact, and is therefore constitutional.

State v. Reed, 248 Ariz. 72, 456 P.3d 453, ¶¶ 2, 19 (2020) (court of appeals had previously affirmed defendant's conviction on appeal; state filed motion requesting restitution, which trial court ordered; defendant appealed restitution order, but died while appeal was pending; court remanded to court of appeals for a decision on merits of appeal of restitution order).

13–116 Double punishment.

.020 Although probation is not generally considered a criminal sentence, this section prohibits imposing a consecutive term of probation for one offense and a term of imprisonment for another offense if they stem from the same act.

State v. Watson, 248 Ariz. 208, 459 P.3d 120, ¶¶ 10–32 (Ct. App. 2020) (because defendant's fraudulent schemes and artifices conviction and theft conviction were based on same act, trial court erred in imposing term of probation to run consecutively to prison sentence).

.090 In order to impose consecutive sentences for two crimes, the defendant must have been able to commit the primary crime without committing the secondary crime.

State v. Dunbar, 249 Ariz. 37, 465 P.3d 527, ¶¶ 47–54 (Ct. App. 2020) (court concluded it was factually possible to commit attempted murder without committing kidnapping, thus consecutive were permissible for those offenses, but it was not factually possible to commit attempted

murder without committing possession of deadly weapon by prohibited possessor, thus consecutive were not permissible for those offenses).

.210 Courts may apply the invited error doctrine only if the party asserting the error is the source of the error, and although the party urging the error need not always be the initial party to propose it, the record must be clear that the party urging the error engaged in affirmative, independent action to create the error or argue in favor of it; in the context of a stipulated plea agreement, the invited error doctrine should apply only when the party took independent affirmative unequivocal action to initiate the error or actively defended the error and did not merely fail to object to the error or merely acquiesce in it, thus when both parties are involved in creating and agreeing to the terms, it must be clear from the record that the defendant not only agreed to the error but either initiated it or actively defended it.

State v. Robertson, 249 Ariz. 256, 468 P.3d 1217, ¶¶ 22–28 (2020) (defendant was charged with first-degree murder and intentional child abuse; defendant pled guilty to manslaughter and reckless child abuse pursuant to plea agreement that provided she would receive prison term for manslaughter and be placed on consecutive period of probation for child abuse, but that she could be sentenced to prison if she violated probation; after completing prison sentence and being placed on probation, defendant violated probation and was sentenced to prison; defendant for first time argued that both counts involved same victim, thus § 13–116 precluded second prison sentence; court held invited error did not apply and remanded matter for court of appeals to consider legality of defendant's sentence under § 13–116).

13–203(A) Causal relationship between conduct and result; relationship to mental culpability—Causal relationship.

.020 An intervening force is not a superseding cause if the defendant's negligence creates the very risk of harm that causes the injury, or when the defendant's conduct increases the foreseeable risk of a particular harm occurring through a second actor.

State v. Aragon (Fontes), 249 Ariz. 573, 473 P.3d 368, ¶¶ 5–14 (Ct. App. 2020) (defendant drove between 70 and 95 miles per hour (posted speed limit was 45 miles per hour) and struck victim's vehicle as victim attempted left-hand turn; neither victim nor his 7-month-old son were properly restrained; both were ejected, and victim was seriously injured and his son died; defendant claimed victims' failure to be properly restrained was superseding cause; court disagreed and held trial court erred in ordering defendant was entitled to jury instruction on superseding cause and to present evidence that victims had not been properly restrained when defendant struck their vehicle).

13–205 Affirmative defenses; justification; burden of proof.

.060 Senate Bill 1449 made the amendment to § 13–205(A) apply "retroactively to all cases in which the defendant did not plead guilty or no contest and that, as of April 24, 2006, had not been submitted to the fact finder to render a verdict"; the court construes this change as applicable to cases that meet both of the following two criteria: (1) the defendant must not have pled guilty or no contest and (2) the case must not have been submitted to the fact finder as of April 24, 2006.

State v. Potter, 248 Ariz. 347, 460 P.3d 816, ¶¶ 10–15 (Ct. App. 2020) (defendant killed victim in August 2005, was indicted November 2006, and pled guilty March 2008; defendant contended that, because his case had not "been submitted to the fact finder as of April 24, 2006," that amendment applied to him and thus his attorney provided ineffective assistance of counsel by

not advising him of that change; court held that, because case must meet both criteria for that change to apply and thus excludes all cases in which the defendant pled guilty (regardless of the date), it did not apply to defendant's case because he pled guilty, and thus his attorney did not provide ineffective assistance of counsel).

13–401 Unavailability of justification defense; justification as defense.

.010 The physical force and deadly physical force justification defenses are not available if the defendant is charged with recklessly injuring or killing an innocent third person.

State v. Sahagun-Llamas, 248 Ariz. 120, 458 P.3d 875, ¶¶ 33–36 (Ct. App. 2020) (defendant was not entitled to jury instruction on self-defense and defense of another for aggravated assault charges, which were based on injury to bus driver, but because endangerment charge did not require proof of actual injury, only proof that defendant recklessly placed victim in imminent danger of injury or death, defendant was entitled to such instruction for endangerment charge).

13–502(A) Insanity test; burden of proof; guilty except insane verdict—Standard.

.050 The Arizona legislature has adopted a test by which a person is insane if the person did not know the act was wrong, which is wrong in accordance with generally accepted moral standards of the community; thus if the person knew the act was wrong, it is no defense that the person believed that the act was not wrong.

State v. Romero, 248 Ariz. 601, 463 P.3d 225, ¶¶ 13–17 (Ct. App. 2020) (defendant stabbed co-worker to death, and while in hospital, grabbed nearby officer's handgun; to prove his GEI defense, defendant was required to prove by clear and convincing evidence that his mental disease or defect rendered him unable to know his acts were legally wrong and morally wrong according to standards of community; defendant contended instructions wrongly informed jurors they could find he knew his conduct was wrong even if he could not understand it was forbidden by law; court stated that, what defendant asserted as error, however, was correct statement of the law; court encouraged trial court in future to give instruction from *State v. Corley,* 108 Ariz. 240, 495 P.2d 470 (1972)).

13–603(C) Authorized disposition of offenders—Restitution.

.010 The trial court should order restitution for losses if the following requirements are satisfied: (1) The loss must be economic; (2) the loss must be one that the victim would not have incurred but for the defendant's criminal offense; and (3) the criminal conduct must directly cause the loss without the intervention of additional causative factors.

State v. Lapan, 249 Ariz. 540, 472 P.3d 1103, ¶¶ 30–37 (Ct. App. 2020) (court held trial court properly awarded restitution to victim's brother for 22 days of annual leave for work he missed as result of victim's death and investigation, and defendant's trial and sentencing).

.240 Although the judgment of conviction and the sentence thereon are complete and valid as of the time of their oral pronouncement in open court, restitution is not part of the sentence, thus the trial court may retain jurisdiction to enter an order of restitution at a later date.

State v. Morgan, 248 Ariz. 322, 460 P.3d 314, ¶¶ 15–26 (Ct. App. 2020) (defendant was convicted of committing sexual acts with his 10-year-old daughter; court held trial court had authority to retain jurisdiction to order restitution for counseling and future assessments that would occur after sentencing).

13–604(A) Class 6 felony; designation—Sentence as class 1 misdemeanor.

.010 A class 6 undesignated offense shall be treated as a felony for all purposes until such time as the court may actually enter an order designating the offense a misdemeanor.

State v. Holmes, 250 Ariz. 311, 478 P.3d 1256, ¶¶ 9–10 (Ct. App. 2020) (defendant pled guilty to solicitation to commit 3rd degree burglary, which plea agreement described as "class 6 undesignated offense" and provided that undesignated offense "shall be treated as a felony for all purposes unless and until the Court enters an order designating the offense a misdemeanor"; trial court accepted guilty plea, but defendant failed to appear for sentencing on multiple occasions; 3 months later, defendant was charged with weapons misconduct (possession of deadly weapon by prohibited possessor) based on state's allegation that defendant had knowingly possessed firearm after he pled guilty to burglary charge; defendant filed motion to dismiss indictment, arguing that, because he had been "denied his due process right to notice" that he was convicted felon and thus prohibited possessor, "his actions [did] not lawfully constitute criminal conduct" and indictment was insufficient as matter of law; court held defendant was "convicted" once he entered his guilty plea, and that violation of offense would occur if defendant knew he possessed firearm and there was no requirement he knew he was prohibited possessor, thus indictment was sufficient and trial court properly denied defendant's motion to dismiss).

13–701(C) Sentence of imprisonment for felony; presentence report; aggravating and mitigating factors; consecutive terms of imprisonment—Method of increasing sentence.

.010 A trial court may impose a maximum prison term only if one or more statutory aggravating factors are found by a jury or admitted by the defendant.

State v. Allen, 248 Ariz. 352, 460 P.3d 1236, ¶¶ 61–71 (2020) (because trial court found only one qualifying aggravating circumstance, sentence was improper, and so remanded for resentencing).

13–701(D)(6) Sentence of imprisonment for felony—Aggravating circumstances—Pecuniary gain.

.010 This section, which applies if the jurors find the defendant committed the offense as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value, is constitutional.

State v. Hernandez, 250 Ariz. 161, 476 P.3d 709, ¶¶ 10–14 (Ct. App. 2020) (jurors heard evidence that, while in jail, defendant was involved with specific street gang and methods gang used to obtain money, and that defendant gave written, detailed instructions to extort money, commit robberies, and set up money transfers; court rejected defendant's contention that section was unconstitutional because it failed to define whether it applied only to benefit person committing crime might gain, or to third party benefits).

13–701(D)(11) Sentence of imprisonment for felony—Aggravating circumstances—Prior conviction of felony within 10 years.

.010 The trial court shall determine and shall consider any felony conviction the defendant has within the 10 years immediately preceding the date of the offense, and may impose an aggravated sentence based on such a conviction.

State v. Dunbar, 249 Ariz. 37, 465 P.3d 527, ¶¶ 40–43 (Ct. App. 2020) (court concluded defendant's 2007 federal conviction qualified under this time limit).

.020 A felony conviction committed outside the jurisdiction of this state is considered a felony conviction under this section only if that offense would be punishable as a felony if committed in Arizona.

State v. Dunbar, 249 Ariz. 37, 465 P.3d 527, ¶¶ 40–43 (Ct. App. 2020) (court concluded defendant's 2007 federal conviction for making false statements or misrepresentations did not include every element that would be required to prove that offense in Arizona, thus that offense was not considered prior felony under this section).

13–702(C) First time felony offender—Aggravated or mitigated term.

.010 The trial court may impose an aggravated term only if at least two of the aggravating circumstances are found beyond a reasonable doubt to be true by the trier of fact or are admitted by the defendant.

State v. Allen, 248 Ariz. 352, 460 P.3d 1236, ¶¶ 61–71 (2020) (because trial court found only one qualifying aggravating circumstance, sentence was improper, and so remanded for resentencing).

13–703(M) Repetitive offenders; sentencing—Conviction from court outside this jurisdiction.

.020 A person who has been convicted of a felony weapons possession violation in any court outside the jurisdiction of this state that would not be punishable as a felony under the laws of this state is not subject to this section, thus the comparative element approach still applies to a felony weapons possession violation.

State v. Dunbar, 249 Ariz. 37, 465 P.3d 527, ¶¶ 36–39 (Ct. App. 2020) (state conceded that, in New York, person could be convicted of weapons misconduct if they had previously been convicted of misdemeanor, whereas in Arizona, person cannot be convicted of weapons misconduct unless they had been previously convicted of felony, thus defendant's prior felony weapon possession convictions could not be used to enhance his sentence).

13–705(M) Dangerous crimes against children—Concurrent and consecutive sentences.

.020 If a defendant is convicted of child molestation or sexual abuse, dangerous crimes against children, the court has the discretion to make the sentences for those offenses concurrent with the sentences for any other offenses if they involved the same victim; however, if the defendant is convicted of any other dangerous crime against children in the first or second degree, the sentence for that conviction must be consecutive to any other sentence, even if the offense is child molestation or sexual abuse against the same victim.

State v. Brock, 248 Ariz. 583, 463 P.3d 207, ¶¶ 27–31 (Ct. App. 2020) (defendant was convicted of two counts of child molestation involving same 13-year-old victim; court held trial court erred in imposing concurrent sentences for those convictions and remanded for resentencing to impose consecutive sentences).

13–705(O) Dangerous crimes against children—Preparatory, attempted, and completed offenses.

.010 A dangerous crime against children is in the first degree if it is a completed offense and is in the second degree if it is a preparatory offense; "preparatory offense" is best understood as refer-

encing the offenses identified in Title 13, chapter 10, as attempt, solicitation, conspiracy, and facilitation.

State v. Allen, 248 Ariz. 352, 460 P.3d 1236, ¶¶ 59–60 (2020) (because defendant was convicted of conspiracy to commit child abuse, which is preparatory offense, he should have been sentenced as second-degree offense, and so remanded for resentencing).

13–708(D) Offenses committed while released from confinement—Offense committed while released on bond or on the person's own recognizance.

.010 A defendant who is on bond or on own recognizance for one offense who is then arrested and is in custody for a second offense is still considered on release for first offense.

State v. Moreno, 249 Ariz. 593, 473 P.3d 722, ¶¶ 4–12 (Ct. App. 2020) (defendant was arrested, charged with felony offenses, and released on bond; 2 months later, officers contacted defendant while responding to "check welfare" call, discovered he had outstanding misdemeanor warrant, and took him into custody; after officer removed defendant's handcuffs to fingerprint him, defendant pulled his arm away from officer and began yelling and running around room; when officers caught defendant, he kicked and fought with them until they eventually subdued him; defendant was convicted of resisting arrest, and trial court imposed additional 2 years on sentence; defendant contended he was no longer on release when he committed subsequent offense; court held no court had modified release conditions for first offense, so he was still on release for that offense when he committed second offense).

13–805(A) Jurisdiction—Court ordered payment.

.010 Nothing in the language of this section, which automatically gives the court limited jurisdiction over the manner of payments until the victim's restitution is paid in full, is inconsistent with a court's additional authority expressly to reserve jurisdiction to award restitution after sentencing.

State v. Morgan, 248 Ariz. 322, 460 P.3d 314, ¶¶ 15–26 (Ct. App. 2020) (defendant was convicted of committing sexual acts with his 10-year-old daughter; court held trial court had authority to retain jurisdiction to order restitution for counseling and future assessments that would occur after sentencing).

13–901.01(A) Probation for persons convicted of possession and use of controlled substances; treatment; prevention; education—First conviction.

.130 A conviction for possession of drugs for sale, whether completed or inchoate, is not a disqualifying conviction for purposes of determining eligibility for mandatory probation and drug treatment under § 13–901.01; additionally, § 13–901.01 applies equally to qualifying inchoate and completed drug offenses.

State v. Green, 248 Ariz. 133, 459 P.3d 45, ¶¶ 1, 7–23 (2020) (court concluded defendant's 2006 conviction for solicitation to sell narcotic drug was not disqualifying prior conviction, or "strike").

13–905 Restoration of civil rights; persons completing probation.

.030 Section 13–921 operates independently of § 13–905, thus a juvenile convicted as an adult need not satisfy the requirements in § 13–905 to apply for relief under § 13–921(B)(1).

State v. Furlong, 249 Ariz. 578, 473 P.3d 707, ¶¶ 7–20 (Ct. App. 2020) (in 1988, at age 17, defendant pleaded guilty to one count of attempted sexual conduct with minor and one count of attempted child molestation, stemming from multiple instances of sexual activity with his niece that occurred when defendant was 14 to 16, and she was 3 to 5; trial court placed defendant on lifetime probation after term of jail and required him to register as sex offender; in 2013, trial court restored defendant's civil rights, in 2014 discharged him from lifetime probation, and in 2015 terminated his sex offender registration requirement; in 2018, defendant moved to (1) set aside his judgment of guilt, (2) dismiss information or indictment where applicable, (3) expunge his record of convictions, and (4) release him from any and all penalties and disabilities resulting from his convictions; trial court denied motion, explaining: "Pursuant to [§ 13–905(K)] this crime may never be set aside due to the age of the victim"; court held trial court erred and vacated trial court's order).

13–917(B) Modification of supervision—Commission of a felony offense.

.010 This section, which requires the trial court to revoke intensive probation and impose a term of imprisonment if it finds the defendant has committed a new felony offense, is constitutional.

State v. Brown, 250 Ariz. 121, 475 P.3d 1161, ¶¶ 13–19 (Ct. App. 2020) (defendant contended statute violated his right to jury trial; court held statute neither mandated punishment for new offense nor unconstitutionally deprived defendant of right to trial by jury; rather, it revoked offender's privilege of probation and imposed prison sentence for original offense, and thus was constitutional).

13–921(B) Probation for defendants under 18 years of age; dual adult juvenile probation—Expungement.

.020 Section 13–921 operates independently of § 13–905, thus a juvenile convicted as an adult need not satisfy the requirements in § 13–905 to apply for relief under § 13–921(B)(1).

State v. Furlong, 249 Ariz. 578, 473 P.3d 707, ¶¶ 7–20 (Ct. App. 2020) (in 1988, at age 17, defendant pleaded guilty to one count of attempted sexual conduct with minor and one count of attempted child molestation, stemming from multiple instances of sexual activity with his niece that occurred when defendant was 14 to 16, and she was 3 to 5; trial court placed defendant on lifetime probation after term of jail and required him to register as sex offender; in 2013, trial court restored defendant's civil rights, in 2014 discharged him from lifetime probation, and in 2015 terminated his sex offender registration requirement; in 2018, defendant moved to (1) set aside his judgment of guilt, (2) dismiss information or indictment where applicable, (3) expunge his record of convictions, and (4) release him from any and all penalties and disabilities resulting from his convictions; trial court denied motion, explaining: "Pursuant to [§ 13–905(K)] this crime may never be set aside due to the age of the victim"; court held trial court erred and vacated trial court's order).

13–1103(A)(5) Provocation Manslaughter.

.010 A person commits provocation manslaughter by committing second degree murder upon a sudden quarrel or heat of passion resulting from adequate provocation by the victim.

State v. Dunbar, 249 Ariz. 37, 465 P.3d 527, ¶¶ 32–33 (Ct. App. 2020) (defendant contended trial court erred in refusing to give instruction for attempted provocation manslaughter as lesser-included offense of attempted first-degree murder; court noted that, by his own account, defen-

dant's decision to fire at victim was not borne from loss of self-control, but fear of bodily injury, and that, although that claim could support self-defense instruction (which defendant received), it did not support provocation manslaughter because nothing in evidence suggested defendant's decision was made upon sudden quarrel or heat of passion resulting from adequate provocation by victim, thus trial court did not err in denying defendant's requested instruction).

13–1105 First-degree murder—Felony murder.

.120 Although the felony of aggravated assault will not support a charge of felony murder, any of the other listed predicate felonies will, and they do not merge into the murder.

State v. Lelevier, 250 Ariz. 165, 476 P.3d 713, ¶¶ 31–38 (Ct. App. 2020) (defendant contended trial court erred in denying his motion for judgment of acquittal on felony murder theory, arguing kidnapping cannot be predicate offense to felony murder under facts of his case because evidence showed only single act (strangulation) had occurred that could satisfy either kidnapping or murder; court noted Arizona's felony murder statute expressly enumerates kidnapping as predicate offense for felony murder and that supreme court has found kidnapping may operate as predicate to felony murder, and thus rejected defendant's merger argument).

13–1202(B) Threatening or intimidating—Enhancement.

.010 Subsection (B)(2), which increases the punishment if the person is a criminal street gang member, violates due process because it enhances criminal penalties based solely on gang status without a sufficient nexus between gang membership and the underlying crime of threatening or intimidating.

State v. Arevalo, 249 Ariz. 370, 470 P.3d 644, ¶¶ 8–28 (2020) (defendant was charged with four counts of threatening or intimidating arising from two events; defendant did not mention any gang affiliation during either encounter, but victims believed defendant was criminal street gang member; court affirmed trial court's dismissal of (B)(2) charges).

13–1204(A)(8)(I) Aggravated assault—On peace officer.

.010 Assault becomes aggravated assault when the accused knows or has reason to know that the victim is a public defender while engaged in the execution of any official duties or if the assault results from the execution of the public defender's official duties, and this includes a private attorney who contracts with the county or other state agencies to represent indigent criminal defendants.

State v. Wilson, 250 Ariz. 197, 477 P.3d 121, ¶¶ 2–10 (Ct. App. 2020) (P.K. was private attorney whose practice consisted primarily of court-appointed criminal-defense contract work, and was being paid by Cochise county to represent defendant, who qualified for P.K.'s services because he was indigent; defendant met with P.K. in Pima County jail, and at conclusion of interview, punched P.K. in face in attempt to create conflict that would force court to appoint him new counsel; court rejected defendant's contention that statute did not extend to assaults on "private attorneys who contract with the county or other state agencies," who are independent contractors with no "official duties").

13–1208(A) Assault; vicious animals; classification; exception; definition—Dog bite.

.010 The enactment of § 13–1208(A) does not demonstrate the legislature's intent to make that statute the sole statute under which a defendant may be charged for a dog assault.

State v. Jones, 248 Ariz. 499, 462 P.3d 576, ¶¶ 11–13 (Ct. App. 2020) (defendant's four dogs bit and latched onto victim's legs; defendant was convicted of aggravated assault with dangerous instrument (a dog); defendant contended he was wrongfully convicted of aggravated assault with dangerous instrument because "the legislature explicitly created a specific crime of aggravated assault with a vicious animal in A.R.S. § 13–1208(A)"; court noted *State v. Fish* had held a dog may be a dangerous instrument, and legislators had left § 13–105(12), as interpreted by *Fish,* unchanged when it adopted § 13–1208(A)).

13–1304(A) Kidnapping—Elements.

.010 The elements of kidnapping are (1) knowingly restraining a person (2) with the intent to commit one or more of the specifically listed offenses.

State v. Dunbar, 249 Ariz. 37, 465 P.3d 527, ¶¶ 19–21 (Ct. App. 2020) (while victim was in her car, defendant pulled his car in front of hers, blocked her escape, and ultimately shot her; defendant contended state did not present sufficient evidence to support his kidnapping conviction; court concluded evidence was sufficient to sustain conviction: Defendant parked his car in front of victim's car, physically restricting her ability to leave scene, and her response showed she did not consent to restraint; defendant contended victim was not substantially restrained because she could have attempted to maneuver her car around his or fled scene on foot; court rejected this argument because fact that victim arguably could have taken extraordinary measures to escape does not change fact that she was confined, and reasonable jurors could have concluded defendant's actions substantially interfered with her liberty if it concluded defendant's placement of car and refusal to move out of way would have forced her to forgo protection of her car and flee on foot or navigate around his car, and could also conclude defendant used this confinement with intent to inflict injury).

13–1405 Sexual conduct with a minor.

.020 This section prohibits sexual intercourse and oral sexual contact, but it does not prohibit sexual contact.

State v. Morgan, 248 Ariz. 322, 460 P.3d 314, ¶¶ 6–9 (Ct. App. 2020) (evidence showed defendant had 10-year-old victim manipulate his testicles; court held that conduct did not fall under definition of sexual intercourse, thus defendant was not guilty of sexual conduct with minor, but it did fall under definition of sexual contact, thus defendant was guilty of child molestation).

13–1407(E) Defenses—Not motivated by a sexual interest.

.030 Treating lack of sexual motivation under § 13–1407(E) as an affirmative defense, which a defendant must prove, does not offend due process.

State v. Bolivar, 250 Ariz. 213, 477 P.3d 672, ¶ 63 (Ct. App. 2020) (defendant contended he was deprived of due process because, at time of his trial, § 13–1407(E) in providing for affirmative defense placed burden of proving lack of sexual motivation on defendant, and asserted state should have been required to prove sexual motivation; court noted supreme court had already determined that statutory scheme did not violate due process and it was not at liberty to overrule or disregard that court's rulings).

13–1410 Molestation of child.

.010 This section makes it a crime for a person intentionally of knowingly to engage in, or to cause a person to engage in, sexual contact (except sexual contact with the female breast) with a

child under 15 years of age, thus it prohibits (1) a person from engaging in this activity, (2) a person from causing the victim to engage in this conduct with himself or herself, and (3) a person from causing a third person to engage in this conduct with the victim.

State v. Morgan, 248 Ariz. 322, 460 P.3d 314, ¶¶ 6–9 (Ct. App. 2020) (evidence showed defendant had 10-year-old victim manipulate his testicles; court held that conduct did not fall under definition of sexual intercourse, thus defendant was not guilty of sexual conduct with minor, but it did fall under definition of sexual contact, thus defendant was guilty of child molestation).

13–1417(D) Continuous sexual abuse of a child—Other charges.

.010 Any other felony sexual offense involving the victim shall not be charged in the same proceeding with a charge under § 13–1417 unless the other charged felony sexual offense occurred outside the time period charged under this section or the other felony sexual offense is charged in the alternative.

State v. Bolivar, 250 Ariz. 213, 477 P.3d 672, ¶¶ 37–48 (Ct. App. 2020) (Count 1 of information charged defendant with continuous sexual abuse of child under § 13–1417 committed between 5/07/2006 and 5/06/2014; Count 2 charged him with sexual conduct with minor committed 5/07/2006 and 5/06/2010; Count 9 charged him with molestation of a child committed between 5/07/2013 and 5/06/2014; trial court was concerned with violation of 13–1417(D) and proposed instructing jurors they could find defendant guilty of Counts 1 or 2 but not both and Counts 1 and 9 but not both; defendant objected; jurors found defendant guilty of all counts except Count 1; defendant contended his convictions for Counts 2 and 9 should be vacated because these charges were invalid for not being charged as alternate counts to Count 1 in information; court held amendment of charging document may remedy noncompliance with 13–1417(D) and that trial court's actions effectively amended information, and noted Rule 13.5(b) provides charges may be amended to correct mistakes of fact or remedy formal or technical defects, and defect in charging document is formal or technical and thus may be corrected through amendment when its amendment does not change nature of the offenses or otherwise prejudice defendant).

13–1802(A) Theft—Elements.

.020 Although **theft** is a lesser-included offense of **theft of a means of transportation,** and **theft** is a lesser-included offense of **robbery,** because **theft of a means of transportation** and **robbery** each has an element the other does not, **theft of a means of transportation** is not a lesser-included offense of **robbery.**

State v. Carter, 249 Ariz. 312, 469 P.3d 449, ¶¶ 12–27 (2020) (defendant stole SUV, for which he was convicted of theft of property, vehicle theft, and robbery; defendant also stole tractor, for which he was convicted of theft of property and vehicle theft; court affirmed defendant's convictions for robbery and two counts of vehicle theft, and vacated his convictions for two counts of theft of property).

13–1814 Theft of means of transportation.

.030 Although **theft** is a lesser-included offense of **theft of a means of transportation,** and **theft** is a lesser-included offense of **robbery,** because **theft of a means of transportation** and **robbery** each has an element the other does not, **theft of a means of transportation** is not a lesser-included offense of **robbery.**

State v. Carter, 249 Ariz. 312, 469 P.3d 449, ¶¶ 12–27 (2020) (defendant stole SUV, for which he was convicted of theft of property, vehicle theft, and robbery; defendant also stole tractor, for which he was convicted of theft of property and vehicle theft; court affirmed defendant's convictions for robbery and two counts of vehicle theft, and vacated his convictions for two counts of theft of property).

13–1902 Robbery.

.060 Although **theft** is a lesser-included offense of **theft of a means of transportation,** and **theft** is a lesser-included offense of **robbery,** because **theft of a means of transportation** and **robbery** each has an element the other does not, **theft of a means of transportation** is not a lesser-included offense of **robbery.**

State v. Carter, 249 Ariz. 312, 469 P.3d 449, ¶¶ 12–27 (2020) (defendant stole SUV, for which he was convicted of theft of property, vehicle theft, and robbery; defendant also stole tractor, for which he was convicted of theft of property and vehicle theft; court affirmed defendant's convictions for robbery and two counts of vehicle theft, and vacated his convictions for two counts of theft of property).

13–2505 Promoting prison contraband; definitions.

.020 A person promotes prison contraband if the person knowingly makes, obtains, or possesses contraband while incarcerated; the statutory scheme as a whole does not require proof that the defendant knew the item possessed is statutorily defined as contraband.

State v. Nunn, 250 Ariz. 366, 480 P.3d 109, ¶¶ 11–16 (Ct. App. 2020) (convictions for both promoting prison contraband and possession of dangerous drug violates double jeopardy).

13–2904(A)(1) Disorderly conduct—Fighting, violent or seriously disruptive behavior.

.010 A defendant may not be convicted of disorderly conduct against an individual under section (A)(1) absent proof the alleged victim's peace was disturbed by seriously disruptive behavior.

Prosise v. Kottke, 249 Ariz. 75, 466 P.3d 386, ¶¶ 12–27 (Ct. App. 2020) (charges arose out of altercation between Forest Services supervisor and defendant over closing of forest road; supervisor testified he was not provoked to respond and he did not feel victimized; court held state needed to show supervisor's peace "was indeed disturbed" by "seriously disruptive behavior . . . of the same general nature as fighting or violence or conduct liable to provoke that response in others and thus to threaten the continuation of some event, function, or activity," and further held evidence presented at trial failed to establish elements and thus reversed conviction).

13–3016(C) Stored oral, wire and electronic communications; agency access; backup preservation; delayed notice; records preservation request—Warrant, subpoena, or court order.

.010 Neither subsection (C) nor the Arizona Rules of Criminal Procedure require the state to obtain a court order from the trial judge assigned to the case.

State v. Smith, 250 Ariz. 69, 475 P.3d 558, ¶ 139 (2020) (court rejected defendant's claim that state committed "fraud on the court" by obtaining CSLI order from IA Court rather than judge assigned to case, and noted record showed it was common practice for PPD to apply for such orders with IA Court).

13–3016(D) Stored oral, wire and electronic communications; agency access; backup preservation; delayed notice; records preservation request—Delay of notice.

.010 The notice that is required by this section may be delayed for a period of not to exceed 90 days if the applicant for a search warrant or court order requests a delay of notification and the court finds that delay is necessary to protect the safety of any person or to prevent flight from prosecution, tampering with evidence, intimidation of witnesses, or jeopardizing an investigation.

State v. Smith, 250 Ariz. 69, 475 P.3d 558, ¶¶ 29–31 (2020) (defendant contended state did not give him prior notice; court noted detective requested IA Court delay disclosure of CSLI order to prevent jeopardizing investigation, and IA Court approved request, thus state had 90 days to notify defendant, and did so 35 days after IA court issued order).

13–3102(A)(4) Misconduct involving weapons—Prohibited acts—Possessing deadly weapon or prohibited weapon by prohibited possessor.

.010 A person violates this section if the person is a prohibited possessor and knowingly possesses a deadly weapon or a prohibited weapon; there is no requirement that the person know he or she was a prohibited possessor.

State v. Holmes, 250 Ariz. 311, 478 P.3d 1256, ¶¶ 5–23 (Ct. App. 2020) (defendant pled guilty to solicitation to commit 3rd degree burglary, which plea agreement described as "class 6 undesignated offense" and provided that undesignated offense "shall be treated as a felony for all purposes unless and until the Court enters an order designating the offense a misdemeanor"; trial court accepted guilty plea, but defendant failed to appear for sentencing on multiple occasions; 3 months later, defendant was charged with weapons misconduct (possession of deadly weapon by prohibited possessor) based on state's allegation that defendant had knowingly possessed firearm after he pled guilty to burglary charge; defendant filed motion to dismiss indictment, arguing that, because he had been "denied his due process right to notice" that he was convicted felon and thus prohibited possessor, "his actions [did] not lawfully constitute criminal conduct" and indictment was insufficient as matter of law; court held defendant was "convicted" once he entered his guilty plea, and that violation of offense would occur if defendant knew he possessed firearm and there was no requirement he knew he was prohibited possessor, thus indictment was sufficient and trial court properly denied defendant's motion to dismiss).

13–3405(A) Possession, use, production, sale, or transportation of marijuana —Prohibited acts.

.010 This section prohibits a person from: (1) possessing or using marijuana; (2) possessing marijuana for sale; (3) producing marijuana; and (4) (a) transporting marijuana for sale, (b) importing marijuana into this state, (c) offering to transport marijuana for sale, (d) offering to import marijuana into this state, (e) selling, transferring, or offering to sell or transfer marijuana.

State v. Farid, 249 Ariz. 457, 471 P.3d 668, ¶¶ 1–19 (Ct. App. 2020) (court rejected defendant's argument that state had to prove, and trial court had to instruct jurors, that defendant had to import marijuana "for sale").

13–3407 Possession, use, administration, acquisition, sale, manufacture or transportation of dangerous drugs.

State v. Nunn, 250 Ariz. 366, 480 P.3d 109, ¶¶ 11–16 (Ct. App. 2020) (court concludes that convictions for both promoting prison contraband and possession of dangerous drug violates double jeopardy).

13–3415(A) Possession, manufacture, delivery and advertisement of drug paraphernalia—Use or possess with intent to use.

.010 A defendant who simultaneously possesses multiple objects of drug paraphernalia commits only one violation of this section.

State v. Soza, 249 Ariz. 13, 464 P.3d 696, ¶¶ 5–23 (Ct. App. 2020) (jurors found defendant committed four separate violations: possessing micro baggies for methamphetamine, possessing micro baggies for heroin, possessing scale for methamphetamine, and possessing same scale for heroin; court concluded defendant committed only one violation subject to prosecution).

.020 State must present sufficient evidence the defendant knowingly possessed, with the intent to use, the item of drug paraphernalia.

State v. Gill, 248 Ariz. 274, 459 P.3d 1209, ¶¶ 9–11 (Ct. App. 2020) (defendant contended there was insufficient evidence he knowingly possessed, with the intent to use, white scale underlying one of his paraphernalia convictions; court noted defendant admitted to police he traded drugs "back and forth" and several people had asked him for heroin or methamphetamine hours before residence was searched; that experienced narcotics detective testified drug dealers often use small scales for measuring weight of drugs for drug transactions; and that even if scale, in plain view in common area of small house in which defendant resided, was also used or possessed by other residents, that would not negate defendant's possession under circumstances here).

13–3421(A) Using building for sale or manufacture of dangerous or narcotic drugs; fortification of a building.

.010 This section prohibits a person (lessee or occupant) from intentionally using a building for the purpose of unlawfully selling, manufacturing, or distributing any dangerous drug or narcotic drug; a completed drug sale is not an element of the offense, but rather it is the defendant's demonstrated purpose in using the building that is the operative factor.

State v. Gill, 248 Ariz. 274, 459 P.3d 1209, ¶¶ 12–17 (Ct. App. 2020) (although defendant conceded methamphetamine and heroin were being sold or distributed from residence on day of his arrest, he contended evidence did not establish that he "was the individual who sold drugs"; court held that, because state presented sufficient evidence defendant used building for prohibited purpose, it did not matter that state did present any evidence that defendant sold drugs).

13–3506 Furnishing obscene or harmful items to minors.

.020 To violate this section, the defendant must provide the victim with an "item" that is "harmful to minors"; item is defined in § 13–3501(2), and sexual activity is defined in § 13–3501(6); taken together, these provisions require that the defendant furnished material that depict or describe a patently offensive description or representation of ultimate sexual acts, masturbation, excretory functions, sadomasochistic abuse, or lewd exhibition of the genitals.

State v. Morgan, 248 Ariz. 322, 460 P.3d 314, ¶¶ 10–14 (Ct. App. 2020) (evidence showed defendant furnished 10-year-old victim with vibrator; court held vibrator did not fall under required definitions, thus defendant was not guilty of furnishing obscene or harmful items to minor).

13–3553(A) Sexual exploitation of a minor—Definitions and conduct.

.020 This statute does not criminalize conduct involving "merely nude" images of minors, and instead prohibits, among other things, the knowing possession of "any visual depiction in which a minor is engaged in exploitive exhibition or other sexual conduct"; "exploitive exhibition" means "the actual or simulated exhibition of the genitals or pubic or rectal areas of any person for the purpose of sexual stimulation of the viewer"; the statutory definition of "exploitive exhibition" substantially circumscribes the statute's scope, excluding nude images of minors that are created for non-sexual purposes; because the challenged statute does not constrain protected expression, and a person does not commit sexual exploitation of a minor unless he or she possesses a nude image of a minor that was created for the purpose of sexual stimulation, statute is not overbroad.

State v. Brock, 248 Ariz. 583, 463 P.3d 207, ¶¶ 10–15 (Ct. App. 2020) (defendant and 13-year-old victim exchanged photographs over internet; defendant contended statute proscribed not only child pornography, but possession of images depicting "merely nude" minors, which he claims is constitutionally protected expression, and argued that applying statute to criminalize his possession of exhibit in question impinged on his First Amendment rights because it depicted victim's pubic region, rather than her genitals, and displayed no overt sexual activity; court held that, because statute does not constrain protected expression and person does not commit sexual exploitation of minor unless person possesses nude image of minor that was created for purpose of sexual stimulation, statute is not overbroad; and although screenshot did not expressly depict any sexual activity, defendant and victim indisputably engaged in online sexual relationship and defendant saved image in folder he named "[Victim]-Sexy," thus jurors could have reasonably found that victim webcast image at issue and that defendant recorded it, for the purpose of his sexual stimulation, thus defendant failed to show statute was unconstitutionally overbroad as applied to him).

13–3821 Persons required to register; procedure.

.020 Because the overriding purpose of § 13–3821 is facilitating the location of child sex offenders by law enforcement personnel and thus its purpose is civil regulatory in nature, not punitive, *Apprendi* does not apply to § 13–3821(A)(3).

State v. Trujillo, 248 Ariz. 473, 462 P.3d 550, ¶¶ 16–86 (2020) (defendant was convicted of sexual abuse, and trial court ordered him to register as sex offender).

13–3922 Controverting grounds for issuance; procedure; restoration of property.

.040 If it appears that probable cause does not exist for believing the items of property are subject to seizure, the magistrate shall cause the property to be restored to the person from whom it was taken if the property is not such that any interest in it is subject to forfeiture or its possession would constitute a criminal offense.

Hamberlin v. Arizona Game & Fish Dep't, 249 Ariz. 31, 465 P.3d 521, ¶¶ 20–25 (Ct. App. 2020) (trial court found facts set forth in affidavit did not establish probable cause and ordered state to return equipment and electronic devices, and also ordered state to turn over digital

copies of data it had made from devices; state contended statute only provided for return of property seized and thus trial court exceeded its remedial authority by ordering state to turn over copies it made of Hamberlin's data; court held trial court's injunctive authority allowed it discretion to craft equitable remedy to promote fairness between parties in any appropriate case, thus it had authority to enter order in question).

13–4033(C) Appeal by defendant—Absence at time of sentencing.

.010 This section precludes a defendant from appealing if the defendant voluntarily absents himself or herself and that prevents the sentencing from occurring within 90 days after conviction; because the Arizona Constitution grants to a defendant the right to appellate review of a conviction, subsection (C) is unconstitutional unless it is shown the defendant knowingly and voluntarily waived the right to appeal by being absent.

State v. Raffaele, 249 Ariz. 474, 471 P.3d 685, ¶¶ 9–15 (Ct. App. 2020) (defendant committed offense in 2013; before trial, defendant failed to appear, and trial court issued bench warrant; in October 2017, defendant was tried in absentia, and jurors found him guilty of transporting 2 pounds or more of marijuana for sale; he was arrested pursuant to bench warrant in February 2019 and sentenced to 12¾ years in prison in April 2019; state failed to raise issue of defendant's absence, and as result, trial court made no finding of knowing, intelligent, and voluntary waiver applicable to appellate jurisdiction; accordingly, record does not support conclusion that defendant waived appellate jurisdiction).

13–4062(4) Anti-marital fact privilege; other privileged communications—Physician-patient.

.020 For information not subject to *Brady,* the physician-patient privilege does not yield to the request of a criminal defendant for information merely because that information may be helpful to the defendant's defense; to be entitled to an *in camera* review of privileged records as a matter of due process, the defendant must establish a [reasonable possibility] [substantial probability] that the protected records contain information critical to an element of the charge or defense, or that their unavailability would result in a fundamentally unfair trial.

Fox-Embrey v. Neal (Main), 249 Ariz. 162, 467 P.3d 1102, ¶¶ 17–63 (Ct. App. 2020) (defendant was charged with capital murder and multiple counts of child abuse as result of other children being undernourished; court noted defendant had specifically identified kinds of records she was seeking and had provided concrete basis for obtaining *in camera* review of those records, and taking that fact together with fact that state was seeking sentence of death [which it concluded provided broader basis for determining whether respondent judge erred in finding defendant did not satisfy applicable disclosure test], court concluded defendant sustained her burden of establishing a reasonable possibility that the protected records contain critical information, thus showing she was entitled to *in camera* review of medical and therapeutic records contained within DCS file that had not yet been disclosed so that respondent judge may determine whether they contained information to which defendant was entitled as matter of due process). **Rev. continued 2/02/2021.**

State v. Dunbar, 249 Ariz. 37, 465 P.3d 527, ¶¶ 23–29 (Ct. App. 2020) (defendant claimed trial court abused its discretion and denied him his due process rights when it denied his request for victim's medical records from Pennsylvania, Maryland, and Arizona, contending victim had mental health history that extended over 15 years and had been diagnosed with severe

depression and bipolar disorder, had a family history of schizophrenia, and history of not taking her medication, being paranoid, and being delusional and dishonest, and further claimed personal knowledge that victim did not take her medication often and her mental conditions had her creating illusions, which may affect her testimony and identification; court held defendant did not provide sufficiently specific basis for requiring victim to produce her medical records and thus failed to establish a reasonable possibility that the protected records contain critical information because defendant's request was nothing more than conclusory assertion that victim's medical records could contain exculpatory information, noting that defendant did not explain how broad assertion that victim was "delusional" would support his misidentification defense, and more importantly, at trial defendant abandoned his proposed claim of misidentification, instead arguing self-defense, and offered no explanation how victim's medical records would be relevant to issue of whether his actions in shooting her were justified, and thus had no apparent relationship to defense actually presented). **Rev. denied 12/15/2020.**

R.S. v. Thompson (Vanders), 247 Ariz. 575, 454 P.3d 1010, ¶¶ 9–28 (Ct. App. 2019) (defendant was charged with second-degree murder; on his request, trial court ordered hospital to disclose deceased victim's privileged mental health records for *in camera* review; court held that, because defendant did not establish substantial probability that protected records contained information critical to element of charge or defense, or that their unavailability would result in fundamentally unfair trial, trial court erred by granting *in camera* review of victim's privileged records). **Rev. granted 8/25/2020.**

13–4234(C) Commencement of proceedings; notice; appointment of counsel for capital defendants; assignment of judge; stay—Time for filing.

.010 This section does not provide an exemption from statutory time limits.

State v. Bigger, 250 Ariz. 174, 476 P.3d 722, ¶¶ 8–19 (Ct. App. 2020) (court stated question was whether § 13–4234(C), which does not include exemption from statutory time limits for constitutional claims, conflicted with new provisions of Rules 32 and 33, which provide that defendant may be excused from filing timely notice when he or she is not at fault for late filing of notice raising such claims; court then harmonized those provisions).

13–4402(A) Implementation of rights and duties—When rights arise and continue.

.020 Victims' rights commence upon the defendant's arrest or formal charging, and are enforceable until the final disposition of the charges, including acquittal or dismissal of the charges, all post-conviction release and relief proceedings, the discharge of all criminal proceedings relating to restitution, and the termination of the requirement to register as a sex offender.

State v. Hamilton, 249 Ariz. 303, 468 P.3d 1264, ¶¶ 2–13 (Ct. App. 2020) (defendant was charged with sexual conduct with minor and six counts of molestation of child; state gave notice it intended to call three women under Rule 404(c) from 2000 case; trial court denied defendant's request to interview those women; count held that, because defendant was still under obligation to register as sex offender in 2000, women were still considered "victims" and thus had right to refuse to be interviewed; court noted that, under A.R.S. § 13–3826(A), defendant may petition to terminate registration requirement after successfully completing probation if certain conditions are met).

§ 13–4402.01 Victims' rights; dismissed counts.

.010 If a criminal offense against a victim has been charged but the prosecution on the count or counts involving the victim has been or is being dismissed as the result of a plea agreement in which the defendant is pleading to or pled to other charges, the victim of the offenses involved in the dismissed counts, on request, may exercise all the applicable rights of a crime victim throughout the criminal justice process as though the count or counts involving the person had not been dismissed.

State v. Hamilton, 249 Ariz. 303, 468 P.3d 1264, ¶ 13 (Ct. App. 2020) (defendant was charged with sexual conduct with minor and six counts of molestation of child; state gave notice it intended to call three women under Rule 404(c) from 2000 case; trial court denied defendant's request to interview those women; defendant contended trial court should treat only one woman as victim because he pled guilty to charges involving her, but charges against other two were dismissed pursuant to plea agreement; court held trial court did not abuse its discretion when it determined all three women were entitled to refuse pretrial interviews with defense counsel).

13–4420 Criminal proceedings; right to be present.

.020 Although a victim has the right to be present throughout all criminal proceedings in which the defendant has the right to be present, if a victim from a prior proceeding is going to called as a witness in a subsequent proceeding pursuant to Rule 404(c), that victim is subject to exclusion under Rule 615 and Rule 9.3(a).

State v. Hamilton, 249 Ariz. 303, 468 P.3d 1264, ¶¶ 14–26 (Ct. App. 2020) (defendant was charged with sexual conduct with minor and six counts of molestation of child; state gave notice it intended to call three women under Rule 404(c) from 2000 case; trial court denied defendant's request to interview those women; count held that, because defendant was still under obligation to register as sex offender in 2000, women were still considered "victims" and thus had right to refuse to be interviewed, but were subject to exclusion under Rule 615; court concluded, however, that any error in allowing them to be present was harmless).

§ 22-114. Authority to act in other precincts within the county or adjoining precincts.

.010 In the absence, illness, or inability to act, or on the request of the justice of the other precinct, each justice of the peace within a county may preside in any other precinct within the county or in any precinct adjoining the precinct regardless of the county in which the adjoining precinct is located, and if two or more justice courts are located within the same city, the justice of one precinct may perform for and on behalf of the justice of the other precinct without being physically present within the precinct of the other justice of the peace.

State v. Fell (Weber), 249 Ariz. 1, 464 P.3d 277, ¶¶ 5–12 (Ct. App. 2020) (Weber was arrested for DUI in geographical area of Pima County Justice of the Peace Precinct 1; her citation ordered her to appear in Pima County Consolidated Justice Court; subsequent form assigned her case to Judge Roberts, justice of peace in Precinct 10, which was located in same facility as Precinct 1 under county consolidation plan; Judge Roberts agreed with Weber that he lacked jurisdiction and dismissed case; court held that, once assigned to case, Judge Roberts effectively served as justice of Precinct 1, thus he had jurisdiction over case).

22–301 Criminal proceedings in justice courts—Jurisdiction of criminal actions.

.010 In a county with a population of more than 2 million persons, the justice of the peace of each justice precinct shall have original jurisdiction to hear misdemeanor offenses that occur within the respective precinct in which the justice of the peace is elected unless either of the following applies: (1) The offense is filed by a municipal officer or agent in a municipal court; or (2) the offense is consolidated with a felony offense in the complaint, information or indictment.

State v. Fell (Weber), 249 Ariz. 1, 464 P.3d 277, ¶¶ 5–12 (Ct. App. 2020) (Weber was arrested for DUI in geographical area of Pima County Justice of the Peace Precinct 1; her citation ordered her to appear in Pima County Consolidated Justice Court; subsequent form assigned her case to Judge Roberts, justice of peace in Precinct 10, which was located in same facility as Precinct 1 under county consolidation plan; Judge Roberts agreed with Weber that he lacked jurisdiction and dismissed case; court held that, once assigned to case, Judge Roberts effectively served as justice of Precinct 1, thus he had jurisdiction over case).

41–1604.09(I) Parole eligibility certification; classifications; appeal; recertification; applicability; definition—Applicability.

.020 A sentence imposing "life without possibility of parole for 25 years" means the convicted defendant is eligible for parole after serving 25 years' imprisonment despite § 41–1604.09's prohibition of parole for persons convicted of offenses occurring on or after January 1, 1994.

Chaparro v. Shinn, 248 Ariz. 138, 459 P.3d 50, ¶¶ 2, 18–22 (2020) (on July 25, 1996, defendant was convicted of first degree murder committed on May 21, 1995; trial court sentenced defendant to prison for "the rest of [his] natural life without the possibility of parole for 25 years, followed by a consecutive term of community supervision equal to 1 day for every 7 days of sentence imposed"; on December 6, 1996, trial court issued *nunc pro tunc* order clarifying that defendant's sentence was "Life without possibility of parole for 25 years" and did not amend term of community supervision; state did not appeal; court held sentence was final a enforceable, and that sentence, although illegally lenient, was final absent timely appeal or post judgment motion).

28–1381(A)(3) Driving or actual physical control—Any illicit drug in the person's body.

.060 To prove a defendant guilty under § 28–1381(A)(3), the state must only prove the presence of a drug or metabolite in the person's body and does not have to prove the person was in fact impaired, thus the provision of the AMMA, A.R.S. § 36–2802(D), which provides immunity to being "under the influence of marijuana," does not immunize a medical marijuana cardholder from prosecution under § 28–1381(A)(3), but instead affords an affirmative defense if the cardholder shows the marijuana or its metabolite was in a concentration insufficient to cause impairment.

State v. Clark, 249 Ariz. 528, 472 P.3d 544, ¶¶ 20–26 (Ct. App. 2020) (defendant was charged with aggravated driving while impaired to slightest degree, and aggravated driving with drug in his body; state's expert testified defendant had 3.6 nanograms per milliliter of marijuana metabolite THC in blood; defendant raised defense in AMMA for defendant to show medical marijuana authorization and concentration of marijuana insufficient to cause impairment; jurors found defendant not guilty of driving while impaired to slightest degree and guilty of driving with drug in his body; defendant contended not guilty of impairment charge showed he had established AMMA defense and thus there was insufficient evidence to support driving with drug in his body charge; court held verdicts could be interpreted as jurors' conclusion that state had not proved impairment charges beyond reasonable doubt, but that defendant had not established AMMA defense by preponderance of evidence; and to extent verdicts could be seen as inconsistent, Arizona allows inconsistent verdicts).

28–1594. Authority to detain persons.

.010 A peace officer or duly authorized agent of a traffic enforcement agency may stop and detain a person as is reasonably necessary to investigate an actual or suspected violation of Title 28 and to serve a copy of the traffic complaint for an alleged civil or criminal violation of Title 28.

Devlin v. Browning, 249 Ariz. 143, 467 P.3d 268, ¶¶ 2, 9–15 (Ct. App. 2020) (officer observed car traveling over speed limit and stopped car; upon contacting driver (defendant), officer saw he had bloodshot, watery eyes and smelled the odor of alcohol; officer asked defendant if he had been drinking, and defendant acknowledged he had; defendant handed officer his license without difficulty, did not appear confused, answered questions appropriately, and did not have "problems with his speech"; officer then conducted "one pass" nystagmus test to determine whether cause of defendant's bloodshot watery eyes might be due to fatigue rather than alcohol consumption and observed a lack of smooth pursuit in defendant's left eye; defendant noted that consuming alcohol and driving is not crime in itself, and that statutes prohibit driving while "impaired to the slightest degree" or with blood alcohol content (BAC) of .08 or more, and contended officer must base reasonable suspicion on some indicia of impairment or a BAC over the legal limit; court held time of night (after 2:00 a.m.) and area involved, which officer testified was known artery for impaired drivers leaving nearby "alcohol establishments," car traveling 10 miles per hour over the speed limit, his observations that defendant's eyes were bloodshot and watery, odor of alcohol emanating from car, defendant's admission to consuming alcohol not long before driving, and indication of nystagmus in one of defendant's eyes, all taken together gave rise to reasonable suspicion).

Devlin v. Browning, 249 Ariz. 143, 467 P.3d 268, ¶¶ 17–18 (Ct. App. 2020) (court noted officer may have reasonable suspicion that driver is in violation of § 28-1381(A)(2) even lacking observations of any signs of physical impairment entirely because that statute requires only that defendant drove vehicle, had an alcohol concentration of .08 or more within 2 hours of driving, and concentration resulted from alcohol consumed either before or while driving, and concluded defendant's speeding 10 miles per hour over the posted limit, odor of alcohol emanating from vehicle, defendant's admission that he had been drinking, and the 2:00 a.m. time when many area alcohol-serving establishments had just closed, might arguably suffice to warrant further investigation, and that officer had significantly more to go on, including, Defendant's watery and bloodshot eyes and tell-tale clue from initial nystagmus indication before being asked to exit his car, all added to totality of circumstances justifying officer's reasonable suspicion of impairment).

April 7, 2021

U.S. Const. amend. 4 Search and seizure—Length of detention.

us.a4.ss.ld.020 For a traffic stop, the duration of the officer's inquiries must extend only as long as necessary to effectuate the purpose of the traffic stop or any related safety concerns; after the original purpose of the stop has been resolved, the officer must permit the driver to leave without further delay or questioning unless: (1) during the traffic stop the officer gains a reasonable and articulable suspicion that the driver is engaged in illegal activity; or (2) the encounter between the officer and the driver ceases to be a detention, but becomes consensual; if a driver agrees to answer additional questions after the conclusion of the traffic stop, he has not been "seized" under the Fourth Amendment and the consensual encounter may extend as long as a reasonable person would feel free to disregard the police and go about his or her business.

State v. Raffaele, 249 Ariz. 474, 471 P.3d 685, ¶¶ 16–21 (Ct. App. 2020) (officer saw driver of vehicle (defendant) commit lane change violation, so officer stopped defendant and said he was issuing warning; defendant gave officer permission to look inside vehicle for rental documents, and when officer did, he smelled marijuana; officer issued warning to defendant and continued to ask him about his trip to California; defendant said he rented vehicle because his car was being repaired and that vehicle was rented in his mother's name because he did not have credit card; officer asked defendant when he last used marijuana, both generally and in vehicle, and defendant said he last smoked 2 days earlier in vehicle and presented his medical marijuana card; officer explained that, although defendant had medical marijuana card, vehicle would still need to be searched to ensure that any marijuana in vehicle was within the regulated amount; short time later, defendant admitted he was transporting about 7 pounds of marijuana from California dispensary; given this admission, officer arrested defendant, searched vehicle, and found 10 pounds of marijuana in trunk; court held that, based on totality of circumstances, officer had reasonable suspicion that criminal activity was afoot despite defendant's presenting his medical marijuana card).

U.S. Const. amend. 4 Search and seizure—Arrest—Warrant—Probable cause.

us.a4.ss.a.pc.010 An officer has probable cause to conduct a search if a reasonably prudent person, based upon facts known by the officer, would be justified in concluding the items sought are connected with criminal activity and that they would be found at the place to be searched.

Hamberlin v. Arizona Game & Fish Dep't, 249 Ariz. 31, 465 P.3d 521, ¶¶ 14–19 (Ct. App. 2020) (warrant alleged Hamberlin had committed two misdemeanor wildlife offenses: (1) using aircraft to assist big game hunter in locating wildlife beginning 48 hours before and during hunting season; and (2) harassing wildlife with aircraft; court agreed with trial court that facts set forth in affidavit did not establish probable cause to search for evidence relating to either offense).

U.S. Const. amend. 4 Search and seizure—Search of cell phone.

us.a4.ss.cp.030 The state must obtain a search warrant based on probable cause to obtain historical cell site location information (CSLI).

State v. Smith, 250 Ariz. 69, 475 P.3d 558, ¶¶ 16–28 (2020) (state conceded it did not obtain search warrant for CSLI information, but contended court order obtained pursuant to § 13–3016 was functional equivalent of warrant; court held order was based on reasonable grounds and not prob-

able cause, and therefore was not functional equivalent of warrant; court applied good faith exception and upheld search).

State v. Conner, 249 Ariz. 121, 467 P.3d 246, ¶¶ 13–24 (Ct. App. 2020) (state applied for and obtained court order for defendant's CSLI; defendant contended police violated his Fourth Amendment rights when they obtained his CSLI with court order instead of warrant; state conceded order was not search warrant; court noted judge issued order after reviewing detective's affidavit, which set forth probable cause, and that order issued was based on probable cause finding and identified places and items to be searched and seized; court thus held defendant failed to show how order was substantively different from search warrant).

us.a4.ss.cp.040 Arizona's standard conditions of probation permit warrantless searches of a probationer's "property," and the plain meaning of "property" includes a cell phone.

State v. Lietzau, 248 Ariz. 576, 463 P.3d 200, ¶¶ 9–15 (2020) (defendant was placed on probation with written conditions that he would submit to search and seizure of person and property by Adult Probation Department without a search warrant; 4 months later, probation officer arrested defendant for violating conditions of his probation based on his failure to provide access to his residence, participate in counseling programs, comply with drug testing, and perform community restitution; on way to jail, officer examined defendant's cell phone and saw numerous text messages between defendant and S.E.; court held conditions of probation permitting warrantless searches of a probationer's "property" applied to cell phones).

U.S. Const. amend. 4 Search and seizure—Search for Internet Protocol address and Internet Service Provider subscriber information.

us.a4.ss.ip.010 Because a person voluntarily provides the person's Internet Protocol (IP) address and subscriber information to an Internet Service Provider (ISP), this information falls within the third party doctrine and thus is not protected by the Fourth Amemdment, so a search warrant is not required, and law enforcement officials may obtain a person's IP address and ISP subscriber information with a lawful federal administrative subpoena.

State v. Mixton, 250 Ariz. 282, 478 P.3d 1227, ¶¶ 14–21 (2021) (undercover detective posted advertisement on online forum seeking users interested in child pornography; person with username "tabooin520" contacted detective and asked to be added to group chat on messaging application called "Kik"; once added, tabooin520 sent images and videos of child pornography to group chat and to detective; at detective request, federal agents served a federal administrative subpoena on Kik to obtain tabooin520's IP address; Kik provided IP address to detective, who used publicly available databases to determine Cox Communications was ISP for IP address; federal agents then served another federal administrative subpoena on Cox for subscriber information associated with IP address; Cox disclosed subscriber information—name, street address, and phone number—of William Mixton; detective used this information to obtain and execute search warrant on Mixton's residence, and seized cell phone, external hard drive, laptop, and desktop computer; subsequent search of these devices revealed photos and videos of child pornography, as well as messages, photos, and videos Mixton sent to detective under username "tabooin520"; Mixton was convicted of 20 counts of sexual exploitation of minor under 15 years of age; court held trial court correctly denied Mixton's motion to suppress).

U.S. Const. amend. 4 Search and seizure—Search of a person on probation or parole.

us.a4.ss.pop.010 As long as the conditions of release authorize such a search, a warrantless search of a person on **parole** may be conducted even without reasonable suspicion; for a person on **probation,** the search must be reasonable under the totality of the circumstances, which requires that the search be conducted by a probation officer in a proper manner and for a proper purpose in determining whether the probationer is complying with the probation obligations.

State v. Lietzau, 248 Ariz. 576, 463 P.3d 200, ¶¶ 16–30 (2020) (defendant was placed on probation with written conditions that he would submit to search and seizure of person and property by Adult Probation Department without a search warrant; 4 months later, woman told defendant's probation officer she believed defendant was having inappropriate relationship with her 13-year-old daughter (S.E.); few weeks later, probation officer arrested defendant for violating conditions of his probation based on his failure to provide access to his residence, participate in counseling programs, comply with drug testing, and perform community restitution; on way to jail, officer examined defendant's cell phone and saw numerous text messages between defendant and S.E.; probation department reported these findings to police department, and detective then obtained search warrant and discovered incriminating photos and text messages in phone; defendant was subsequently indicted on charges of sexual conduct with minor; court held that, under totality of circumstances, including defendant's significantly diminished privacy rights as probationer, his acceptance of search conditions when he agreed to probation, which included his cell phone, probation department's well-grounded suspicion that Lietzau might be involved in serious offense with adolescent child, and well-known use of cell phones as aid in committing sexual offenses against children, officer's search of defendant's cell phone was reasonable, thus trial court abused its discretion in granting defendant's motion to suppress).

U.S. Const. amend. 4 Search and seizure—Challenge to a warrant.

us.a4.ss.cw.010 A defendant may challenge a search warrant based on false or incomplete information, and if the defendant makes a substantial preliminary showing (1) that the affiant knowingly, intentionally, or with a reckless disregard for the truth, included a false statement in the affidavit, and (2) the false statement was necessary to the finding of probable cause, the defendant is entitled to a (*Franks*) hearing.

State v. Lapan, 249 Ariz. 540, 472 P.3d 1103, ¶¶ 8–24 (Ct. App. 2020) (defendant contended detective downplayed strength of and skewed defendant's alibi, omitted "crucial information" about another possible suspect, and omitted defendant's co-workers' statements that corroborated defendant's description of source of his injuries, and that high number of misstatements made defendant look more responsible than available information suggested and showed detective's mental state while omitting information in affidavit was less than reckless and more likely intentional; court held defendant did not make substantial preliminary showing that false statements and material omissions were made, at minimum, with reckless disregard for truth, thus he did not establish first prong and therefore was not entitled to evidentiary hearing, and that, even if that material were removed from affidavit, there remained sufficient information to establish probable cause).

U.S. Const. amend. 5 Double jeopardy.

us.a5.dj.090 A conviction of both a greater offense and a lesser-included offense violates double jeopardy.

State v. Nunn, 250 Ariz. 366, 480 P.3d 109, ¶¶ 11–16 (Ct. App. 2020) (conviction for both promoting prison contraband and possession of a dangerous drug violated double jeopardy).

U.S. Const. amend. 5 Double jeopardy—Collateral estoppel and res judicata.

us.a5.dj.ce&rj.020 Collateral estoppel does not preclude the state from proceeding in a subsequent action unless (1) the same parties were involved in both actions, (2) the party against whom the earlier decision is asserted had a full and fair opportunity to litigate the issue involved, (3) the same issue of ultimate fact is to be litigated in the subsequent proceeding as was determined in the prior proceeding, (4) the same burden of proof applies in both proceedings, and (5) the previous judgment is valid and final.

State v. Cruz, 249 Ariz. 596, 473 P.3d 725, ¶¶ 8–14 (Ct. App. 2020) (during defendant's 2009 trial on sexual misconduct and kidnapping charges, he escaped from custody; trial proceeded in defendant's absence, and he was found guilty on multiple charges, but sentencing could not occur in his absence; after defendant was arrested years later, he was charged and tried for escape; he contended he was not person who had escaped from custody, and jurors found him not guilty; defendant then argued acquittal in escape case collaterally estopped state from trying to prove his identity at sentencing in sexual assault case; trial court rejected defendant's argument, found state proved identity beyond reasonable doubt, and sentenced defendant to prison; court held defendant was unable to explain how event occurring after finding of guilt but before sentencing could collaterally estop state from proving defendant's identity at sentencing, and even assuming collateral estoppel could apply to this unusual fact pattern, defendant did not show that issues at stake in escape case and sentencing proceeding in sexual assault case were "precisely the same").

U.S. Const. amend. 6 Counsel—Pre-trial and trial.

us.a6.cs.tr.010 The Sixth Amendment gives the defendant the right to counsel at all critical stages of the proceedings, and the right to self-representation.

State v. Smith, 250 Ariz. 69, 475 P.3d 558, ¶¶ 40–41 (2020) (defendant contended state violated his Sixth Amendment right to counsel because, when it submitted its request for CSLI Order, it did not provide notice to his attorney, and as result, he asserted his attorney was denied opportunity to oppose state's request; court held there was no error because his attorney was provided copies of CSLI and had opportunity to suppress this evidence at evidentiary hearing).

U.S. Const. amend. 6 Counsel—Ineffective assistance of counsel; Performance.

us.a6.cs.iac.115 The determination of what motions to file is a strategic or tactical decision, and will support a claim of ineffective assistance of counsel only if there was no reasonable basis for the action taken.

State v. Bigger, 250 Ariz. 174, 476 P.3d 722, ¶¶ 20–30 (Ct. App. 2020) (court held counsel's choices were either strategic or tactical decision, and in any event defendant did not suffer prejudice).

us.a6.cs.iac.147 In an appeal, the determination of which issues to present is a strategic or tactical decision, and counsel's failure to predict future changes in law is not ineffectiveness because "clairvoyance" is not required attribute of effective representation.

State v. Macias, 249 Ariz. 335, 469 P.3d 472, ¶¶ 17–21 (Ct. App. 2020) (appellate counsel did not provide ineffective assistance of counsel for failing to raise issue that federal district court decided after counsel filled appellate brief).

U.S. Const. amend. 6 Trial by jury—*Apprendi*/*Blakely*/*Alleyne* issues.

us.a6.jt.a/b.035 Because the overriding purpose of § 13–3821 is facilitating the location of child sex offenders by law enforcement personnel and thus its purpose is civil regulatory in nature, not punitive, *Apprendi* does not apply to § 13–3821(A)(3).

State v. Trujillo, 248 Ariz. 473, 462 P.3d 550, ¶¶ 16–86 (2020) (defendant was convicted of sexual abuse, and trial court ordered him to register as sex offender).

U.S. Const. amend. 8 Cruel and unusual punishment.

us.a8.cu.060 In determining whether a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality, the court is not limited to looking only at the nature of the offense generally, and may instead look at the circumstances of the particular offense and the particular offender.

State v. Kleinman, 250 Ariz. 362, 480 P.3d 105, ¶¶ 12–13 (Ct. App. 2020) (when defendant was 20 years old, he was convicted of three counts of sexual conduct with minor that he committed on his sister when he was 12 or 13 years old and she was 5 or 6 years old; defendant was sentenced to three consecutive 13-year sentences; state acknowledged this was "an extremely rare case" and unique facts and circumstances made 39-year sentence grossly disproportionate to offenses; court vacated sentences and remanded for resentencing for convictions as Class 2 non-dangerous felony offenses).

us.a8.cu.110 In determining proportionality, courts usually do not consider the imposition of consecutive sentences because the Eighth Amendment analysis focuses on the sentence imposed for each specific crime, not on the cumulative sentence.

State v. Soto-Fong et al., 250 Ariz. 1, 474 P.3d 34, ¶¶ 2–5, 28–31 (2020) (Soto-Fong was convicted of three counts of first degree murder, one count of armed robbery, two counts of attempted armed robbery, one count of aggravated robbery, and two counts of attempted aggravated robbery, and was sentenced to three consecutive life sentences without possibility of release for 25 years plus additional consecutive sentences so that he will not be eligible for release until he has served 109 years of imprisonment; Clay was convicted of first degree murder, attempted murder, and aggravated assault, and was sentenced to life with possibility of parole after 25 and consecutive concurrent terms of 9 years and 12 years, and is now eligible for parole on life sentence; Kasic was convicted of 32 counts, including six counts of arson of occupied structure, 15 counts of endangerment, one count of attempted arson of occupied structure, and one count of aggravated assault, and was sentenced to enhanced concurrent and consecutive prison sentences totaling nearly 140 years; court held no defendant was entitled to relief).

us.a8.cu.120 The Eighth Amendment does not prohibit a de facto juvenile life sentence.

State v. Soto-Fong et al., 250 Ariz. 1, 474 P.3d 34, ¶¶ 1, 27–36, 40 (2020) (Soto-Fong was convicted of three counts of first degree murder, one count of armed robbery, two counts of attempted armed robbery, one count of aggravated robbery, and two counts of attempted aggravated robbery, and was sentenced to three consecutive life sentences without possibility of release for 25 years plus additional consecutive sentences so that he will not be eligible for release until he has served 109 years of imprisonment; Clay was convicted of first degree murder, attempted murder, and aggravated assault, and was sentenced to life with possibility of parole after 25 and consecutive concurrent terms of 9 years and 12 years, and is now eligible for parole on life sentence; Kasic was convicted of 32 counts, including six counts of arson of occupied structure, 15 counts of endangerment, one count of attempted arson of occupied structure, and one count of aggravated assault, and was sentenced to enhanced concurrent and consecutive prison sentences totaling nearly 140 years; court held no defendant was entitled to relief).

U.S. Const. amend. 14 Due process—Collection, retention, and disclosure of evidence.

us.a14.dp.ev.030 There is no general federal constitutional right to discovery in a criminal case; the Due Process Clause of the federal Constitution imposes on the state only the obligation to disclose exculpatory evidence that is material on the issue of guilt or punishment, and the obligation not to take any affirmative action that interferes with the defendant's right to gather exculpatory evidence.

State v. Dunbar, 249 Ariz. 37, 465 P.3d 527, ¶¶ 23–29 (Ct. App. 2020) (defendant claimed trial court abused its discretion and denied him his due process rights when it denied his request for victim's medical records from Pennsylvania, Maryland, and Arizona, contending victim had mental health history that extended over 15 years and had been diagnosed with severe depression and bipolar disorder, had a family history of schizophrenia, and history of not taking her medication, being paranoid, and being delusional and dishonest, and further claimed personal knowledge that victim did not take her medication often and her mental conditions had her creating illusions, which may affect her testimony and identification; court held defendant did not provide sufficiently specific basis for requiring victim to produce her medical records and that defendant's request was nothing more than conclusory assertion that victim's medical records could contain exculpatory information, noting that defendant did not explain how broad assertion that victim was "delusional" would support his misidentification defense, and more importantly, at trial defendant abandoned his proposed claim of misidentification, instead arguing self-defense, and offered no explanation how victim's medical records would be relevant to issue of whether his actions in shooting her were justified, and thus had no apparent relationship to defense actually presented).

us.a14.dp.ev.150 For information not subject to *Brady,* the physician-patient privilege does not yield to the request of a criminal defendant for information merely because that information may be helpful to the defendant's defense; to be entitled to an *in camera* review of privileged records as a matter of due process, the defendant must establish a [reasonable possibility] [substantial probability] that the protected records contain information critical to an element of the charge or defense, or that their unavailability would result in a fundamentally unfair trial.

Fox-Embrey v. Neal (Main), 249 Ariz. 162, 467 P.3d 1102, ¶¶ 17–63 (Ct. App. 2020) (defendant was charged with capital murder and multiple counts of child abuse as result of other children being undernourished; court noted defendant had specifically identified kinds of records she was seeking and had provided concrete basis for obtaining *in camera* review of those records, and taking that fact together with fact that state was seeking sentence of death [which it concluded

provided broader basis for determining whether respondent judge erred in finding defendant did not satisfy applicable disclosure test], court concluded defendant sustained her burden of establishing a reasonable possibility that the protected records contain critical information, thus showing she was entitled to *in camera* review of medical and therapeutic records contained within DCS file that had not yet been disclosed so that respondent judge may determine whether they contained information to which defendant was entitled as matter of due process). **Rev. continued 2/02/2021.**

State v. Dunbar, 249 Ariz. 37, 465 P.3d 527, ¶¶ 23–29 (Ct. App. 2020) (defendant claimed trial court abused its discretion and denied him his due process rights when it denied his request for victim's medical records from Pennsylvania, Maryland, and Arizona, contending victim had mental health history that extended over 15 years and had been diagnosed with severe depression and bipolar disorder, had a family history of schizophrenia, and history of not taking her medication, being paranoid, and being delusional and dishonest, and further claimed personal knowledge that victim did not take her medication often and her mental conditions had her creating illusions, which may affect her testimony and identification; court held defendant did not provide sufficiently specific basis for requiring victim to produce her medical records and thus failed to establish a reasonable possibility that the protected records contain critical information because defendant's request was nothing more than conclusory assertion that victim's medical records could contain exculpatory information, noting that defendant did not explain how broad assertion that victim was "delusional" would support his misidentification defense, and more importantly, at trial defendant abandoned his proposed claim of misidentification, instead arguing self-defense, and offered no explanation how victim's medical records would be relevant to issue of whether his actions in shooting her were justified, and thus had no apparent relationship to defense actually presented). **Rev. denied 12/15/2020.**

R.S. v. Thompson (Vanders), 247 Ariz. 575, 454 P.3d 1010, ¶¶ 9–28 (Ct. App. 2019) (defendant was charged with second-degree murder; on his request, trial court ordered hospital to disclose deceased victim's privileged mental health records for *in camera* review; court held that, because defendant did not establish substantial probability that protected records contained information critical to element of charge or defense, or that their unavailability would result in fundamentally unfair trial, trial court erred by granting *in camera* review of victim's privileged records). **Rev. granted 8/25/2020.**

U.S. Const. amend. 14 Due process—Identification procedures.

us.a14.dp.id.060 To establish a due process violation, a defendant must establish that the identification is not otherwise reliable, which will depend on (1) the witness's opportunity to view the person, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description, (4) the witness's level of certainty at the confrontation, and (5) the length of time between the crime and the confrontation.

State v. Smith, 250 Ariz. 69, 475 P.3d 558, ¶¶ 44–61 (2020) (court noted (1) witness was able to see defendant, tried to look at him entire time, and saw him clearly; (2) her attention was directed at defendant when he was in apartment; (3) she never provided description of defendant before officer showed her photograph; (4) she was confident when she identified defendant; and (5) she identified defendant day after seeing him; based on totality of circumstances, court concluded record supported trial court's determination that witness's identification of defendant was reliable).

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Ariz. Const. art. 2, sec. 2.1(A)(3). Victim's rights — Right to be present.

az.2.2.1.a.3.040 Although a victim has the right to be present throughout all criminal proceedings in which the defendant has the right to be present, if a victim from a prior proceeding is going to called as a witness in a subsequent proceeding pursuant to Rule 404(c), that victim is subject to exclusion under Rule 615 and Rule 9.3(a).

State v. Hamilton, 249 Ariz. 303, 468 P.3d 1264, ¶¶ 14–26 (Ct. App. 2020) (defendant was charged with sexual conduct with minor and six counts of molestation of child; state gave notice it intended to call three women under Rule 404(c) from 2000 case; trial court denied defendant's request to interview those women; court held that, because defendant was still under obligation to register as sex offender in 2000, women were still considered "victims" and thus had right to refuse to be interviewed, but were subject to exclusion under Rule 615; court concluded, however, that any error in allowing them to be present was harmless).

Ariz. Const. art. 2, sec. 2.1(A)(5). Victim's rights — Right to refuse an interview, deposition, or other discovery request.

az.2.2.1.a.5.080 For information not subject to *Brady,* the physician-patient privilege does not yield to the request of a criminal defendant for information merely because that information may be helpful to the defendant's defense; to be entitled to an *in camera* review of privileged records as a matter of due process, the defendant must establish a [reasonable possibility] [substantial probability] that the protected records contain information critical to an element of the charge or defense, or that their unavailability would result in a fundamentally unfair trial.

Fox-Embrey v. Neal (Main), 249 Ariz. 162, 467 P.3d 1102, ¶¶ 17–63 (Ct. App. 2020) (defendant was charged with capital murder and multiple counts of child abuse as result of other children being undernourished; court noted defendant had specifically identified kinds of records she was seeking and had provided concrete basis for obtaining *in camera* review of those records, and taking that fact together with fact that state was seeking sentence of death [which it concluded provided broader basis for determining whether respondent judge erred in finding defendant did not satisfy applicable disclosure test], court concluded defendant sustained her burden of establishing a reasonable possibility that the protected records contain critical information, thus showing she was entitled to *in camera* review of medical and therapeutic records contained within DCS file that had not yet been disclosed so that respondent judge may determine whether they contained information to which defendant was entitled as matter of due process). **Rev. continued 2/02/2021.**

State v. Dunbar, 249 Ariz. 37, 465 P.3d 527, ¶¶ 23–29 (Ct. App. 2020) (defendant claimed trial court abused its discretion and denied him his due process rights when it denied his request for victim's medical records from Pennsylvania, Maryland, and Arizona, contending victim had mental health history that extended over 15 years and had been diagnosed with severe depression and bipolar disorder, had a family history of schizophrenia, and history of not taking her medication, being paranoid, and being delusional and dishonest, and further claimed personal knowledge that victim did not take her medication often and her mental conditions had her creating illusions, which may affect her testimony and identification;

court held defendant did not provide sufficiently specific basis for requiring victim to produce her medical records and thus failed to establish a reasonable possibility that the protected records contain critical information because defendant's request was nothing more than conclusory assertion that victim's medical records could contain exculpatory information, noting that defendant did not explain how broad assertion that victim was "delusional" would support his misidentification defense, and more importantly, at trial defendant abandoned his proposed claim of misidentification, instead arguing self-defense, and offered no explanation how victim's medical records would be relevant to issue of whether his actions in shooting her were justified, and thus had no apparent relationship to defense actually presented). **Rev. denied 12/15/2020.**

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Ariz. Const. art. 2, sec. 2.1(C). Victim's rights—Definition of "victim."

az.2.2.1.c.140 The constitutional protections afforded a crime victim do not mandate that a specific term be used in referring to the victim during court proceedings; instead, the trial court retains discretion to address—on a case-by-case basis—whether using a particular term to refer to a victim violates the victim's right to be treated with respect and dignity.

State v. Bolivar, 250 Ariz. 213, 477 P.3d 672, ¶¶ 5–14 (Ct. App. 2020) (defendant contended trial court abused discretion in denying his motion to preclude state and witnesses from referring to "Becca" as victim; court held *Z.W./Foster* did not establish that term "victim" is inappropriate when defendant disputes whether crime occurred and that there was no authority to support defendant's argument that term "victim" is prohibited when state's key evidence is testimony of alleged victim; court further noted Becca's brother and mother also gave evidence supporting charged offenses; and finally trial court's instructions would have rendered any error harmless).

Ariz. Const. art. 2, sec. 8. Right to privacy.

az.2.8.020 Except for cases involving homes, Arizona courts have not yet held Article 2, section 8, grants broader protections against search and seizure than those available under the federal constitution.

x1 *State v. Mixton,* 250 Ariz. 282, 478 P.3d 1227, ¶¶ 27–63 (2021) (federal agents served federal administrative subpoena and obtained defendant's IP and internet service provider (ISP), and then obtained defendant's street address; based on this information, detective obtained search warrant for that address; defendant contended officers' conduct violated his Fourth Amendment rights; court looked to federal cases and concluded internet user has no actual (subjective) expectation of privacy in IP address or personally identifying information he or she submitted to his or her ISP to subscribe to its service, and thus concluded search did not violated Arizona Constitution).

State v. Smith, 250 Ariz. 69, 475 P.3d 558, ¶¶ 32–33 (2020) (defendant contended trial court should have suppressed CSLI information under Arizona Constitution; court held obtaining CSLI information did not involve warrantless entry into person's home, and even if Arizona Constitution provided greater protection, good-faith exception applied).

Ariz. Const. art. 2, sec. 15. Cruel and unusual punishment.

az.2.15.cu.010 There is nothing in the language of the Arizona Constitution, or in the opinions interpreting that language, to indicate that the Arizona Constitution gives a defendant any greater rights against cruel and unusual punishment than does the United States Constitution.

State v. Soto-Fong et al., 250 Ariz. 1, 474 P.3d 34, ¶¶ 41–44 (2020) (court concluded Arizona Constitution does not prohibit de facto juvenile life sentence).

az.2.15.cu.090 The Arizona Constitution does not prohibit a de facto juvenile life sentence.

State v. Soto-Fong et al., 250 Ariz. 1, 474 P.3d 34, ¶¶ 41–44 (2020) (Soto-Fong was convicted of three counts of first degree murder, one count of armed robbery, two counts of attempted armed robbery, one count of aggravated robbery, and two counts of attempted aggravated robbery, and was sentenced to three consecutive life sentences without possibility of release for 25 years plus additional consecutive sentences so that he will not be eligible for release until he has served 109 years of imprisonment; Clay was convicted of first degree murder, attempted murder, and aggravated assault, and was sentenced to life with possibility of parole after 25 and consecutive concurrent terms of 9 years and 12 years, and is now eligible for parole on life sentence; Kasic was convicted of 32 counts, including six counts of arson of occupied structure, 15 counts of endangerment, one count of attempted arson of occupied structure, and one count of aggravated assault, and was sentenced to enhanced concurrent and consecutive prison sentences totaling nearly 140 years; court held no defendant was entitled to relief).

Article 6, section 27. Charge to juries; reversal of cause for technical errors—Comment on the evidence.

az.6.27.030 In order for a trial court's statement to be considered a comment on the evidence, the statement must express an opinion of what the evidence proves.

State v. Bolivar, 250 Ariz. 213, 477 P.3d 672, ¶¶ 15–17 (Ct. App. 2020) (defendant contended trial court's use of term "victim" to describe "Becca" constituted improper comment of evidence; court held that, because jury instructions, taken as whole, clearly established burden of proof remained on state and that defendant was presumed innocent until proved guilty, use of term "victim" by trial court was not error).

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